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Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict

Report of the Secretary-General

Summary

The present report is submitted pursuant to General Assembly resolution 64/10 of 5 November 2009. On 3 December 2009, the Secretary-General sent notes verbales to the Permanent Mission of Israel to the United Nations, the Permanent Observer Mission of Palestine to the United Nations and the Permanent Mission of Switzerland to the United Nations, drawing their attention to the relevant provisions of resolution 64/10, and requesting written information by 29 January 2010 concerning any steps that may have been taken or were in the process of being taken in relation to their implementation. The full text of the materials received by the Secretariat in reply to those requests is attached as annexes. The report also contains the observations of the Secretary-General.

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I. Introduction

1. The present report is submitted in pursuance of paragraph 6 of General Assembly resolution 64/10 of 5 November 2009 on the follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict, in which the Secretary-General was requested to report to the General Assembly, within a period of three months, on the implementation of the resolution. To fulfil this request, it was therefore necessary to ascertain what steps the parties named in paragraphs 3, 4 and 5 had taken.

2. On 3 December 2009, the Secretary-General drew the attention of the Permanent Mission of Israel to the United Nations to resolution 64/10, with the request that the Permanent Mission provide the Secretariat with written information by 29 January 2010 of any steps that the Government of Israel may have taken or was in the process of taking further to the call of the General Assembly in paragraph 3 of the resolution.

3. On 29 January 2010, the Secretariat received a document from the State of Israel entitled "Gaza operation investigations: an update". The full text of the document is attached as annex I to the present report.

4. On 3 December 2009, the Secretary-General drew the attention of the Permanent Observer Mission of Palestine to the United Nations to resolution 64/10, with the request that the Permanent Observer Mission provide the Secretariat with written information by 29 January 2010 of any steps that the Palestinian side may have taken or was in the process of taking further to the exhortation of the General Assembly in paragraph 4 of the resolution.

5. On 29 January 2010, the Secretary-General received a letter of the same date from the Permanent Observer Mission of Palestine to the United Nations conveying a letter dated 27 January 2010 from the Prime Minister of the Palestinian Authority, Salam Fayyad. The full text of the letters is attached as annex II to the present report.

6. On 3 December 2009, the Secretary-General drew the attention of the Permanent Mission of Switzerland to the United Nations to resolution 64/10, with the request that the Permanent Mission provide the Secretariat with written information by 29 January 2010 of any steps that the Government of Switzerland may have taken or was in the process of taking further to the recommendation of the General Assembly in paragraph 5 of the resolution.

7. On 29 January 2010, the Secretary-General received a letter of the same date from the Permanent Mission of Switzerland concerning the steps taken in connection with General Assembly resolution 64/10 on the follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict. The full text of the letter is attached as annex III to the present report.

II. Observations

8. At the beginning of 2009, I visited both Gaza and southern Israel in order to help to end the fighting and to show my respect and concern for the deaths and injuries of so many people during the conflict in and around Gaza. I was, and remain, deeply affected by the widespread death, destruction and suffering in the

Gaza Strip, as well as moved by the plight of civilians in southern Israel who have been subject to indiscriminate rocket and mortar fire.

9. I believe that, as a matter of principle, international humanitarian law needs to be fully respected and civilians must be protected in all situations and circumstances. Accordingly, on several occasions, I have called upon all of the parties to carry out credible domestic investigations into the conduct of the Gaza conflict. I hope that such steps will be taken wherever there are credible allegations of human rights abuses.

10. It is my sincere hope that General Assembly resolution 64/10 has served to encourage investigations by the Government of Israel and the Palestinian side that are independent, credible and in conformity with international standards.

11. I note from the materials received that the processes initiated by the Government of Israel and the Government of Switzerland are ongoing, and that the Palestinian side initiated its process on 25 January 2010. As such, no determination can be made on the implementation of the resolution by the parties concerned.

Annex I

[Original: English]

Gaza operation investigations: an update

January 2010

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EXECUTIVE SUMMARY

1. This Paper describes Israel's process for investigating alleged violations of the Law of Armed Conflict. It focuses in particular on investigations, legal proceedings, and lessons learned in relation to the actions of the Israeli Defence Forces (IDF) in Gaza from 27 December 2008 through 18 January 2009 (the "Gaza Operation," also known as "Operation Cast Lead").

2. The Paper supplements and updates a paper Israel released in July 2009, *The Operation in Gaza: Factual and Legal Aspects*,[1] which addressed a range of factual and legal issues related to the Gaza Operation. The earlier paper included detailed accounts of Hamas's incessant mortar and rocket attacks on Israel's civilians (some 12,000 such attacks in the 8 years prior to the Operation) and the steadily increasing range of such attacks; Hamas's suicide bomb attacks; and Hamas's smuggling of weaponry and ammunition through tunnels under the Egyptian-Gaza border, as well as Israel's attempts to address these threats through non-military means, including diplomatic overtures and urgent appeals to the United Nations.

3. *The Operation in Gaza* also set out the legal framework governing the use of force and the principles – including the principles of distinction and proportionality – that apply in such a conflict. It also described the IDF's efforts to ensure compliance with these principles during the Gaza Operation and the *modus operandi* of Hamas, in particular its abuses of civilian protections that created such acute operational dilemmas.

4. *The Operation in Gaza* also included preliminary findings of a number of the investigations established following the operation, although such investigations were, and remain, works in progress. For this reason, six months after the publication of the original paper, it is appropriate once again to take stock publicly regarding the progress made and the current findings of the investigative process. While many of these investigations are still underway, this Paper aims to present a clear and up-to-date picture of the current status of Israel's investigations.

5. Israel's system for investigating alleged violations of the Law of Armed Conflict is comparable to the systems adopted by other democratic nations, including the United Kingdom, the United States, Australia, and Canada. The Paper notes that Israel has demonstrated its ability and its commitment to pursue serious criminal charges to uphold

[1] *The Operation in Gaza: Factual and Legal Aspects*, *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm.

the Law of Armed Conflict, a commitment which has been confirmed by outside observers and foreign legal systems.

6. Israel's investigative system has multiple layers of review to ensure impartiality and independence. These include the Military Advocate General's Corps (MAG), which determines whether to initiate criminal investigations and file charges against IDF soldiers. The Military Advocate General is legally independent from the military chain of command. Israel's Attorney General provides civilian oversight, as any decision of the Military Advocate General on whether or not to investigate or indict may be subject to his review. Further review is available through Israel's Supreme Court either as an appeals court, or exercising judicial review over any decision of the Military Advocate General or the civilian Attorney General. Such review can be – and frequently is – initiated by a petition of any interested party, including non-governmental organisations, Palestinians, and other non-citizens.

7. The Paper describes the structure and process of operation of these various elements of Israel's investigative system in some detail, particularly in order to correct misrepresentations and inaccuracies in recent reports describing these mechanisms.[2]

8. Describing the application of these mechanisms to the Gaza Operation, the Paper notes that the IDF to date has launched investigations of 150 separate incidents arising from the Gaza Operation. A number of these were opened at the IDF's own initiative. Others were opened in response to complaints and reports from Palestinian civilians, local and international non-governmental organisations, and U.N. and media reports.

9. Of the 150 incidents, so far 36 have been referred for criminal investigation. To date, criminal investigators have taken evidence from almost 100 Palestinian complainants and witnesses, along with approximately 500 IDF soldiers and commanders. The Paper describes some of the challenges encountered in the conduct of the investigations, including accessing evidence from battlefield situations and the need to make arrangements, together with non-governmental organisations such as B'Tselem, to locate and interview Palestinian witnesses. To address these challenges, special investigative teams have been appointed and are currently investigating complaints arising from the Gaza Operation.

[2] Numerous assertions made by the Human Rights Council's Report of the U.N. Fact-Finding Mission on the Gaza Conflict – for example, that criminal investigations must await the completion of a military command investigation or that all command investigators are within the direct chain of command – are incorrect.

10. The Paper relates to all investigations initiated following the Gaza Operation and does not limit itself to those incidents in the Human Rights Council's Report of the U.N. Fact-Finding Mission on the Gaza Conflict, chaired by Justice Richard Goldstone (the "Human Rights Council Fact-Finding Report" or "Report"). As Israel has clarified before, Israel disagrees with the findings and recommendations of the Report, which reflect many misunderstandings and fundamental mistakes with regard to the Gaza Operation, its purposes, and Israel's legal system. This Paper, however, is not intended as a comprehensive response to the Report or a catalogue of the Report's serious inaccuracies and misstatements.

11. With respect to the incidents described in the Human Rights Council Fact-Finding Report, the Paper notes that, prior to the publication of the Report, Israel was investigating 22 of the 34 incidents it addresses. The remaining 12 incidents, none of which had previously been brought to the attention of the Israeli authorities, were promptly referred for investigation upon the Report's publication. The Paper details the various stages of investigation of these incidents. It also notes that in some cases, after reviewing all the evidence available, the Military Advocate General has concluded that there was no basis for criminal investigations. The Paper gives detailed accounts of a number of these incidents.

12. The Paper also provides updated information regarding the special command investigations initiated by the IDF Chief of General Staff after the conclusion of hostilities in Gaza. As noted in *The Operation in Gaza*, shortly after the close of the Operation, the Chief of General Staff appointed five senior field commanders to investigate the most serious allegations of wrongdoing. The Chief of General Staff recently adopted a recommendation by the Military Advocate General and initiated a sixth special investigation, to consider additional allegations and to re-examine a complaint that a command investigator could not substantiate.

13. The Paper provides updates regarding the findings of these investigations, which have, in addition to prompting criminal inquiries, further command investigations, and disciplinary proceedings, also yielded operational lessons resulting in changes already made or underway.

14. The Paper concludes by recognizing the importance of conducting the investigative process in a timely manner. At the same time, it notes the need to ensure that legal processes are conducted thoroughly and with full due process, and in a manner comparable with that of other states guided by a respect for the rule of law.

I. INTRODUCTION

1. This Paper describes Israel's process for investigating alleged violations of the Law of Armed Conflict.[1] It focuses in particular on investigations, legal proceedings, and lessons learned in relation to the actions of the Israeli Defence Forces (IDF) in Gaza from 27 December 2008 through 18 January 2009 (the "Gaza Operation," also known as "Operation Cast Lead").

2. The Gaza Operation represented a striking example of the complex and challenging asymmetric conflicts in which states are increasingly finding themselves. In such conflicts, states are forced to confront non-state actors which do not regard themselves as bound by legal or humanitarian obligations. Such actors frequently abuse these principles as a deliberate strategy, placing both their own civilian population and that of the defending state at greater risk.

3. Faced with such challenges, and the acute real-time dilemmas created by militants operating from within and behind civilian areas, the importance of legal guidance and full compliance with legal and humanitarian obligations is paramount. At the international level, this requires close dialogue and consultation between states confronting similar threats in order to share experience and to consider how established principles of law can best be applied in such complex circumstances. At the national level, it requires continuous efforts to ensure that the principles of the Law of Armed Conflict are an integral part of the training of soldiers and commanders, and that these principles guide planning and operational decisions.

4. Beyond these measures, which are generally taken prior to and during operations, extreme importance must also be given to reviewing the operation after the fact. This should include the thorough investigation of all incidents that raise questions regarding the appropriateness or lawfulness of measures used or decisions made. The complexity and scale of such operations means that inevitably there are tragic instances, mistakes, and errors of judgment.[2] Tragic results, including civilian death and damage to property do not necessarily mean that violations of international law have occurred. At the same time, in

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[1] This Paper uses the term "Law of Armed Conflict" in its ordinary sense – describing the legal obligations of parties to an armed conflict in the course of their military operations. The term "International Humanitarian Law" is used by many commentators and countries as an interchangeable term. Israel, like many other countries, prefers the term Law of Armed Conflict.

[2] A harsh reminder for Israel of this reality is the fact that nearly half of its soldiers killed during the Gaza Operation were killed by IDF fire mistakenly directed towards them.

instances in which evidence indicates that violations have taken place, this must be fully investigated and prosecuted.

5. Israel is committed to ensuring that every such incident is fully and fairly investigated, to ensure that lessons can be learned and that, if justified, criminal or disciplinary proceedings initiated. To this end the IDF policy requires that every allegation of wrongdoing be investigated, irrespective of its source. The 150 separate incidents investigated following the Gaza Operation include, as detailed later in this Paper, not only investigations opened as a result of Israel's own concerns about certain incidents but also investigations in response to complaints and reports from Palestinian residents, local and international non-governmental organisations and UN and media reports.

6. Parts II and III of this Paper provide an overview of Israel's mechanisms for investigating alleged violations of the Law of Armed Conflict. These include mechanisms operating within the IDF, but independently of the military chain of command as well as civilian oversight mechanisms including the Attorney General and the Supreme Court sitting as the High Court of Justice, with power of judicial review over every decision to prosecute or not prosecute alleged offenders. Israel's system of investigation and prosecution is comparable to that of many democratic states confronting similar challenges, and in the course of Part III reference is made to the systems other states have developed in this regard.

7. Part IV focuses specifically on the investigation of complaints alleging violations of the Law of Armed Conflict during the Gaza Operation and sets out where the investigations opened currently stand. It also addresses some of the lessons that have already been learned, including changes to operational procedures, as a result of the findings of the investigations conducted so far.

II. OVERVIEW OF ISRAEL'S SYSTEM FOR REVIEWING MISCONDUCT ALLEGATIONS

8. Israel is a democracy, with a well-developed legal system. Even though it has confronted constant and existential threats from neighbouring states and non-state actors, Israel stands committed to the rule of law. As Israel's Supreme Court has recognized:

> "This is the destiny of a democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."[3]

9. Under Israel's Basic Law for the Military, the IDF is subordinate and accountable to the civilian Government. Like any other governmental authority, it is subject to the rule of law, including the applicable rules of international law. The Israeli system of justice holds the Government, including the IDF, to its legal obligations.

10. First and foremost, Israel is committed to educating state agents – in this case, IDF commanders and soldiers – of their duties and restrictions. This includes the widespread dissemination of relevant Law of Armed Conflict principles across the ranks of the IDF.[4] When violations of those principles are suspected, the Israeli justice system is designed not only to mete out punishment and deter future violations but also to provide the opportunity for redress to parties injured by state offences. The lawlessness of an adversary, or the severity of the threat they pose, is not and cannot be an excuse for unlawful or improper conduct.

11. To ensure compliance with the rule of law, including international law and the Law of Armed Conflict, the IDF has established a system to investigate and pursue allegations of misconduct. This system, like its counterparts in many states, includes multiple components and layers of review – an internal military disciplinary procedure, a network of military police, prosecutors, and courts, and a process for oversight by civilian authorities and the judiciary. While individual components of this system – like any

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[3] *Public Committee Against Torture in Israel v. State of Israel*, HCJ 5100/94 ¶ 39 (6 September 1999).

[4] This dissemination is particularly important since Israeli law forbids a soldier from complying with an order that is manifestly unlawful.

governmental organisation – may not always work as intended, numerous checks and balances ensure that the rule of law is upheld.

A. The Military Justice System

12. Israel's military justice system, like those of many other democracies, is part of the state's military forces but is professionally independent. Israel's Military Justice Law of 1955 established the Court Martial system and governs the investigation, indictment, and prosecution of those accused of misconduct. This military justice system deals with all allegations of offences or violations of law committed by IDF personnel, including allegations of improper conduct on the battlefield.

13. The military justice system includes three main components: the Military Advocate General's Corps, the Military Police Criminal Investigation Division (MPCID), and the Military Courts.

(1) The Military Advocate General's Corps

14. The Military Advocate General's Corps is comprised of highly professional and trained lawyers, and is responsible for enforcing the rule of law throughout the IDF.[5] It also provides advice on military, domestic, and international law to the Chief of General Staff and all divisions of the IDF.[6] The decisions and legal opinions of the Military Advocate General are binding on all components of the military.[7]

15. Although he serves on the General Staff of the IDF, the Military Advocate General is legally independent. IDF Supreme Command Orders state that in executing his powers and authority, the Military Advocate General is "subject to no authority but the law."[8] Thus, the Chief of General Staff has no authority over him regarding legal matters. The Military Advocate General is not subject to direct orders of any superior officers, excluding the Chief of Staff in non-legal matters. As a former Military Advocate General has explained, the Military Advocate General has a unique status in the military:

[5] Military Justice Law, § 178(2), (4); IDF Supreme Command Order 2.0613(2)(a).

[6] Military Justice Law, § 178(1); IDF Supreme Command Order 2.0613(2)(b)(4).

[7] *See Avivit Atiyah v. Attorney General*, HCJ 4723/96 ¶ 11 (29 July 1997).

[8] IDF Supreme Command Order 2.0613(9)(A).

> "Members of the Military Advocate are not subject to the functional command orders of the command ranks that they serve, and the decisions that they make are in their exclusive discretion. The MAG is not subordinate to the Chief of Staff in respect of the exercise of his powers and is not under any command whatsoever – de jure or de facto."[9]

16. The independence of the Military Advocate General extends to every officer within the Military Advocate General's Corps. Each is subordinate only to the Military Advocate General and is not subject to direct orders by commanders outside the Corps.

17. The manner in which the Military Advocate General is appointed further evidences his independence. Under the Military Justice Law, the Minister of Defence appoints the Military Advocate General, upon a recommendation of the Chief of General Staff of the IDF.[10] Most other senior officers in the IDF are appointed directly by the Chief of General Staff.

18. The Military Advocate General's dual enforcement and advisory responsibilities parallel those of chief military lawyers in other countries, such as the United Kingdom.[11] The units within the Military Advocate General's Corps that issue legal guidance to the IDF and that examine and prosecute alleged crimes by IDF forces are separate from one another. The latter function of the Military Advocate General's Corps is conducted by the Chief Military Prosecutor, Military Advocates (who head regional and other prosecution units), and military prosecutors (collectively, "the military prosecution").

19. The military justice system empowers the Military Advocate General, the Chief Military Prosecutor, and the Military Advocates to direct the prosecution of soldiers for military offences identified in the Military Justice Law (such as absence without leave, conduct unbecoming an officer, and pillage), as well as criminal offences under Israel's general Penal Law.[12] When the evidence establishes a reasonable likelihood that a crime or infraction has been committed, a Military Advocate may order a prosecutor to file an indictment in the Military Courts or order a commander to hold a disciplinary hearing.

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[9] Menachem Finkelstein and Yifat Tomer, *The Israeli Military Legal System – An Overview of the Current Situation and a Glimpse Into the Future*, 52 AIR FORCE L. REV. 137, 140 (2002) (footnotes omitted), *available at* http://findarticles.com/p/articles/mi_m6007/is_2002_Wntr/ai_103136516/?tag=content;col1.

[10] Military Justice Law, § 177(a).

[11] *See* Part III.E below.

[12] Military Justice Law, § 280.

Like any criminal proceeding, this process requires military prosecutors to examine the evidence carefully and to file an indictment only if there is sufficient evidence.[13]

20. In 2007, the Military Advocate General established a specialized unit within the military prosecution, the Office of the Military Advocate for Operational Affairs, to oversee all investigations and to conduct all prosecutions of alleged operational misconduct – particularly, alleged misconduct by IDF soldiers against Palestinian civilians during military operations. The mandate of the Office includes investigation and prosecution of alleged violations of the Law of Armed Conflict. The prosecutors assigned specifically to the Office have special training and expertise to address the unique difficulties in investigating and trying these kinds of cases. When necessary, prosecutors from other units supplement this unit.

(2) The Military Police Criminal Investigation Division (MPCID)

21. The MPCID is the primary entity within the IDF for investigating alleged crimes committed by soldiers. It has hundreds of trained investigators, including reservists, who are posted in different regional and specialized units. The training course of each investigator lasts about six months, including legal studies at the IDF's School of Military Law, which is under the authority of the Military Advocate General. After concluding this training, each soldier is required to pass an examination conducted by a Military Advocate before he or she is authorized to serve as an MPCID investigator.[14]

22. The scope of the MPCID's activities is substantial. In the last five years, the unit opened almost 3,300 investigations on average each year and collected more than 11,000 testimonies. The MPCID investigates an average of 5,500 suspects and arrests an average of 1,400 people per year. In 2009, seven percent of these investigations involved Palestinian complainants.

23. Criminal investigators who handle complaints by Palestinians undergo specialized training, including training in international law. Some of these investigators are Arabic speakers, while others use Arabic interpreters, who participate in interviews with Palestinian complainants and witnesses.

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[13] Under Israeli Supreme Court precedent, a criminal indictment may only be filed where a "reasonable chance to convict" exists in light of all evidence collected, including exculpatory evidence. *See, e.g., Yahav v. State Attorney*, HCJ 2534/97 (30 June 1997).

[14] Military Justice Law, § 252(A)(3).

24. As necessary, MPCID investigators consult with prosecutors from the Military Advocate General's Corps regarding the proper handling of an investigation. In addition, the Military Advocate General appointed a legal officer from the Military Advocate General's Corps to serve as the legal adviser of the MPCID. The legal adviser works to ensure that legal policy is assimilated in MPCID standing orders and regulations.

25. At the conclusion of an investigation, the MPCID reports to the military prosecution and transfers the file for review by a prosecutor. In many cases, the military prosecution returns the file to MPCID with concrete instructions to conduct a supplemental investigation. If no supplement is needed, a Military Advocate or the Chief Military Prosecutor decides whether to initiate criminal or disciplinary proceedings, based on the evidence available and the nature of the alleged misconduct. In cases of heightened complexity or sensitivity, this decision is made in consultation with the Military Advocate General.

(3) The Military Courts

26. The Military Courts adjudicate charges against IDF soldiers for military and other criminal offences through a Court Martial. The Courts, which include the Military Court of Appeals and several regional courts, are composed of both professional military judges and regular officers (who must have no connection to the cases they hear). Every Court Martial must include at least one professional military judge, and professionals must comprise a majority of any appellate panel.[15] The Military Justice Law provides that "[i]n judicial matters, a military judge is not subject to any authority save that of the law, and is not subject in any way to the authority of his commanders."[16]

27. Military commanders do not appoint professional military judges. Rather, an independent commission comprised of the Minister of Defence, the Minister of Justice, members of the Israeli Supreme Court and the Military Court of Appeals, and a representative of the Israeli Bar Association (among others), makes the appointments.[17] Professional military judges serve in a separate military courts unit, headed by the President of the Military Court of Appeals. The cadre of professional military judges includes many civilian judges, who

[15] Military Justice Law, §§ 202, 216.

[16] Military Justice Law, § 184. The Israeli Supreme Court has noted that the participation of regular officers in Courts Martial serves "to emphasize the common responsibility of all of those who serve in the military regarding what happens in the military." *Katz v. President of the Court Martial, Central Jurisdictional District*, HCJ 142/79 ¶ 6 (10 June 1979).

[17] *See* Military Justice Law, § 187(a).

may preside over military proceedings as part of their military reservist duties.[18] Professional military judges can be removed only for gross misconduct, under a special procedure.

28. Even though the Military Courts are located within military bases, their proceedings are generally open to the public. Military Courts may conduct proceedings *in camera* only in limited circumstances, such as when an open proceeding would jeopardize the security of the state.[19] The news media can and does cover Military Court proceedings, and many judgments of the Military Courts are published on the official website of the Israeli judiciary, as well as on various public online databases. In general, the rules of evidence in the Military Courts are practically identical to the rules applicable in civilian criminal proceedings.[20]

29. Prosecutors have the right to appeal a sentence they regard as too lenient. Traditionally, the Military Courts have dealt sternly with soldiers convicted of offences against civilians. For example, in *Military Prosecutor v. Sgt Ilin*, the Military Court of Appeals increased the sentence of a soldier convicted of looting. The court observed:

> "A soldier committing prohibited acts during armed conflict inflicts injury upon the human dignity of the conquered as well as upon the humanity of the conqueror. . . . It is clear therefore that the thunder of war and the heat of the battle actually demand reinforcement and amplification of the voice of morality . . . ."[21]

30. Likewise, in *Military Prosecutor v. Corp. Lior and Corp. Roi*, the Military Court of Appeals raised the sentences of two soldiers serving in the Military Police who were convicted of assaulting Palestinian detainees. The court concluded:

> "The respondents grossly violated their obligations as human beings, citizens of the State of Israel, as soldiers and as police officers. The respondents are part of the Israeli society, soldiers in the IDF and members of the Military Police. In their actions, they harmed each and every person who is a part of these groups. The damage of their actions

[18] *See* Military Justice Law, §§ 185(b), 187C.

[19] *See* Military Justice Law, § 324.

[20] *See* Military Justice Law, § 476 (establishing that evidence law applicable to criminal proceedings in civilian courts shall apply in Military Courts unless a specific provision states differently). Rules of evidence that are unique to the Military Courts must be interpreted in light of similar provisions and the principles of general evidence law. *See Isascharov v. Military Prosecutor General*, Cr.A. 5121/98 (4 May 2006).

[21] *Military Prosecutor v. Sgt. Ilin*, C/62/03 ¶ E (23 May 2003).

> is not limited to the ugly act they committed. It radiates in a circular pattern – similar to a rock thrown down a well – on its entire surrounding."[22]

B. Civilian Supervision Over the Military Justice System

(1) Attorney General of Israel

31. The decision of the Military Advocate General whether or not to open a criminal investigation, as well as his decision whether or not to file an indictment, may be subject to further review by the Attorney General of the State of Israel, an independent figure of high authority.

32. For example, in *Avivit Atiyah v. Attorney General*, the Israeli Supreme Court ruled that the Attorney General could order the Military Advocate General's Corps to change its position concerning whether to file a criminal indictment. The Court ruling has been interpreted as follows:

> "[T]he power of the Attorney General to impose his opinion on the MAG will, in those cases, include the cancellation of and the filing of a charge in a court-martial. In other words, even if the MAG thinks, in these cases, that a charge ought not be filed, and the matter is brought before the Attorney General ... the Attorney General shall be authorized to decide that a charge should be filed, and his decision shall prevail."[23]

33. A complainant or non-governmental organisation may trigger the review of the Attorney General by simply sending a letter to the Attorney General, requesting further review of the matter.

(2) Supreme Court of Israel

34. Civilian judicial review of the military system occurs in two ways. First, the Supreme Court of Israel has discretion to hear direct appeals from judgments of the Military Court of Appeals "concerning an important, difficult, or innovative legal question."[24] Second, the

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[22] *Military Prosecutor v. Corp. Lior and Corp. Roi*, C/128/03 and C/146/03 ¶ 17 (21 August 2003).

[23] Finkelstein and Tomer, *supra*, at 163 (referring to precedent set in *Avivit Atiyah v. Attorney General*, HCJ 4723/96 (29 July 1997)).

[24] Military Justice Law, § 440I(a),(b).

Supreme Court, sitting as the High Court of Justice, can review and reverse a decision of the Military Advocate General, the military prosecution, and/or the Attorney General whether to investigate or file a criminal indictment concerning alleged misconduct by soldiers.

35. Any interested party (including non-governmental organisations) or any person (including non-citizens and non-residents) affected or potentially affected by a government action can petition the Supreme Court, residing as the High Court of Justice, on a claim that the action is *ultra vires*, unlawful, or substantially unreasonable. When warranted, the Supreme Court can enjoin the Government or grant other relief. Under Israel's legal system, a ruling of the Supreme Court against the IDF or another government agency is final and binding.

36. Palestinian residents, as well as non-governmental organisations or persons representing their interests, have filed successful petitions challenging the Military Advocate General's exercise of prosecutorial discretion. Some examples include:

- The Supreme Court reversed the Military Advocate General's decision not to file criminal charges against a high-ranking field commander, and the commander ultimately was convicted on those charges.[25]

- During a Supreme Court hearing, the Military Advocate General's Corps consented to opening a military criminal investigation into an incident that had only previously been examined by a command investigation.[26]

- The Supreme Court intervened in the Military Advocate General's decision to indict a soldier and a commander for "unbecoming conduct" (rather than more serious offences), in connection with the alleged firing of a rubber bullet at the feet of a detainee.[27] Following the judgment, the Military Advocate General's Corps amended the indictment, charging the commander and the soldier with more serious offences.[28]

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[25] *See Jamal Abed al Kader Mahmoud Zofnan v. Military Advocate General*, HCJ 425/89 (27 December 1989).

[26] *See Brian Avery v. Military Advocate General*, HCJ 11343/04 (1 March 2005).

[27] *Ashraf Abu Rahma v. Military Advocate General*, HCJ 7195/08 (1 July 2009) ("The military justice system, which is in charge of implementing the IDF's values of conduct, must send out a determined message of consistent and decisive defence of the basic values of the society and the army, and of uncompromising enforcement in all levels – educational, commanding authority and punitive – of the fundamental principles that are shared by the Israeli society and the Israeli army and give them their ethical and humane character.").

[28] The amended indictment charged the commander with the offence of threats under Section 192 of Israel's Penal Law and the soldier with the crime of illegal use of a firearm in accordance with Section 85

[Footnote continued on next page]

37. In other cases, the Supreme Court has affirmed the Military Advocate General's decisions not to file charges, corroborating the Court's authority to approve, as well as disapprove, those decisions.[29]

38. As noted above, the Court has enforced the obligation of the state and the IDF to abide by applicable law (including international law) and humanitarian standards, notwithstanding the reality and constant threat of terrorist attacks.[30] For example, the Court held in 2006:

> "'Israel is not an isolated island. It is a member of an international system.' ... The combat activities of the IDF are not conducted in a legal void. There are legal norms – some from customary international law, some from international law entrenched in conventions to which Israel is party, and some in the fundamental principles of Israeli law – which determine rules about how combat activities should be conducted."[31]

39. The Israeli Supreme Court has demonstrated that it can and will intercede in actual hostilities between the IDF and Palestinian terrorist organisations – including the Gaza Operation. In January 2009, while IDF forces were still fighting Hamas in Gaza, the Court reviewed two petitions by human rights groups challenging the IDF's efforts to satisfy humanitarian obligations to Palestinian civilians.[32] The Court "endeavour[ed] to examine the claims in real time, so that it may grant effective relief or arrive at an agreed settlement."[33] In doing

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[Footnote continued from previous page]
of the Military Justice Law. Both were also charged with the offence of conduct unbecoming an officer. The case is pending in Military Court.

[29] *See, e.g., Iman Atrash v. Military Advocate General*, HCJ 10682/06 (18 June 2007).

[30] Official English translations of over 25 cases that address this issue are available at the website of Israel's Supreme Court, http://elyon1.court.gov.il/VerdictsSearch/EnglishStaticVerdicts.html. *See, e.g., Public Committee Against Torture in Israel v. State of Israel*, HCJ 5100/94 (6 September 1999); *Iad Ashak Mahmud Marab v. IDF Commander in West Bank*, HCJ 3239/02 (6 February 2003); *Beit Sourik Village Council v. State of Israel*, HCJ 2056/04 (30 June 2004); *Zaharan Yunis Muhammad Mara'aba v. Prime Minister of Israel*, HCJ 7957/04 (15 September 2005); *Ahmad Issa Abdalla Yassin, Bil'in Village Council Chairman v. State of Israel*, HCJ 8414/05 (15 December 2008); *Public Committee Against Torture in Israel v. State of Israel*, HCJ 769/02 (14 December 2006); *Adalah - The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, HCJ 3799/02 (6 October 2005).

[31] *Public Committee Against Torture in Israel v. State of Israel*, HCJ 769/02 ¶ 17 (14 December 2006) (quoting *Physicians for Human Rights v. Commander of IDF Forces in Gaza*, HCJ 4764/04 (30 May 2004)).

[32] *Physicians for Human Rights v. Prime Minister of Israel*, HCJ 201/09 and 248/09 (19 January 2009). After examining the steps taken by the IDF and high command authorities, the Court determined that they had indeed complied with international law.

[33] *Id.* ¶ 13.

so, the President of the Court affirmed the Court's jurisdiction to hear such petitions even in the midst of combat:

> "Cases in which the court examines the legality of military operations while they are happening are not uncommon occurrences, in view of the reality of our lives in which we are constantly confronting terrorism that is directed against the civilian population of Israel, and in view of the need to respond to it while discharging the duties imposed by law even in times of combat. . . . [I]t is the role of the court, even in times of combat, to determine whether within the framework of the combat operations the obligation to act in accordance with legal guidelines – both within the context of Israeli law and within the context of international humanitarian law – is being upheld."[34]

40. Israel's Supreme Court has earned international respect for its jurisprudence and its independence in enforcing international law. Its rulings balancing security and individual rights are highly regarded by jurists and academic scholars of international law, and have been cited favourably by foreign courts, including the Supreme Court of Canada, the House of Lords in the United Kingdom, and the European Court of Justice.[35]

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[34] *Id.* ¶ 12. Also during the Gaza Operation, the Supreme Court considered a petition from foreign journalists seeking to enter Gaza at military checkpoints. *Foreign Press Association in Israel v. OC Southern Command*, HCJ 9910/08 (2 January 2009). The Court affirmed that "the freedom of speech and the freedom of the press . . . have an all the more special importance" during armed hostilities, *id.* ¶ 5, but the Gaza Operation ended before the dispute was completely resolved. *Foreign Press Association in Israel v. OC Southern Command*, HCJ 643/09 (25 January 2009).

[35] *See, e.g.*, *Application Under S. 83.28 of Criminal Code*, 2004 SCC 42 ¶ 7 (Supreme Court of Canada 2004) (citing the "eloquent" statements of Israel's Supreme Court on the importance of responding to terrorism within the rule of law); *Suresh v. Canada*, [2002] 1 S.C.R. 3, 2002 SCC ("we note that the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combating terrorism and protecting national security"); *A and Others v. Secretary of State for Home Department*, 2 A.C. 221 ¶ 150 (U.K. House of Lords 2005) (emphasizing importance of the United Kingdom "retain[ing] the moral high ground which an open democratic society enjoys," and thereby "uphold[ing] the values encapsulated in the judgment of the Supreme Court of Israel in *Public Committee Against Torture in Israel v. Israel* . . . [that] '[a]lthough a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand'") (citation omitted); *Kadi v. Council of European Union*, 3 C.M.L.R. 41 ¶ AG 45 (European Court of Justice 2008) (quoting former President of Supreme Court of Israel regarding importance of judicial oversight of political decisions: "It is when the cannons roar that we especially need the laws . . . . It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it.").

III. THE INVESTIGATION OF ALLEGED VIOLATIONS OF THE LAW OF ARMED CONFLICT

41. The consistent policy of the IDF has been to investigate alleged violations of the Law of Armed Conflict, regardless of the source of the allegations, and to prosecute where there is credible evidence that a violation has occurred. This policy reflects a commitment to resolve complaints against IDF personnel fairly, impartially, and effectively. Israel's Attorney General has affirmed this policy and it has been presented to the High Court of Justice for review.

42. The effectiveness of Israel's justice system has been acknowledged by international bodies. For example, the Criminal Chamber of the National Court of Spain (Audiencia Nacional) decided by a wide margin last year to discontinue a Spanish investigation into alleged IDF war crimes in the Gaza Strip. The proceedings concerned a 2002 incident during which the IDF killed the head of Hamas's military wing but also a number of civilians during an air strike. A Spanish judge had opened an inquiry into the matter pursuant to Spain's universal jurisdiction statute.

43. In closing the investigation, the Criminal Chamber of the National Court of Spain emphasised Israel's ability fully and fairly to investigate the charges itself. Contrary to the allegations raised in the Human Rights Council Fact-Finding Report, the Court held that Israeli procedures and precedents with regard to defensive strikes, and the military, civilian, and judicial review in Israel of the incident, comport with principles of international law. The court stated:

> "[D]isputing the impartiality and organic and functional separation from the Executive of the Israeli Military Advocate General, the Attorney General of the State of Israel and the Investigation Commission appointed by the Israeli Government involves ignoring the existence of a social and democratic state with rule of law, where the members of the Executive and the Judiciary in question are subject to the rule of law. On the basis of those premises, there can be no doubt whatsoever with regard to the exercise of pertinent criminal actions in the event that the existence of any criminally relevant conduct on the part of the

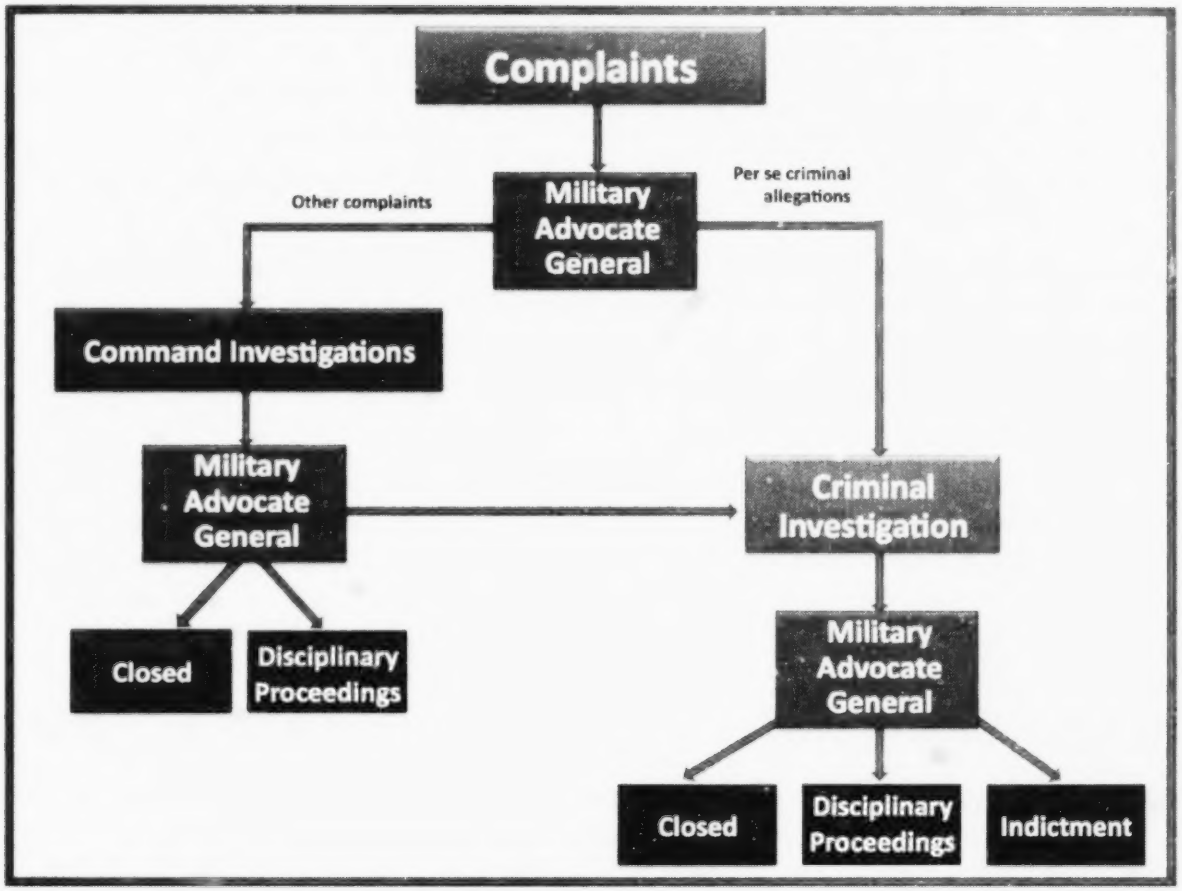
individuals who ordered, planned and carried out the bomb attack should come to light in the course of the investigations performed."[36]

44. In general, the investigation policy of the IDF regarding alleged violations of the Law of Armed Conflict is as follows:

- The Military Advocate General reviews complaints from a variety of sources.
- The Military Advocate General refers individual complaints for a command investigation or, when there is an allegation of *per se* criminal behaviour, for a criminal investigation.
- For those complaints referred for a command investigation, the Military Advocate General reviews the record and findings of the command investigation, along with other available material, to determine whether to recommend disciplinary proceedings and whether there is a suspicion of a criminal act – in which case the complaint is referred for a criminal investigation.
- Following a criminal investigation, the Military Advocate General reviews the entire evidentiary record to determine whether or not to file an indictment or to recommend disciplinary proceedings.

45. This process is illustrated in the following diagram:

[36] Unofficial translation of Decision no. 1/2009, 17 July 2009 (plenary), of the National Criminal Court of Appeals ("Sala de lo Penal de la Audiencia Nacional"), at 24, regarding Preliminary Criminal Proceedings no. 154/2008 of the Central Investigation Court no. 4. *See also* Appeal of the Coordinating Prosecutor (Pedro Martinez Torrijos), 6 May 2009, from the Order of the Audiencia Nacional de Madrid, 4 May 2009, in Preliminary Proceedings Case No. 157/2008 (emphasizing that Israel's investigatory system, with review by Military Advocate General, Attorney General, and Supreme Court, "fully satisfy" the requirements of "an independent and impartial system of justice").



A. Sources of Complaints

46. The IDF investigates alleged violations of the Law of Armed Conflict in essentially the same way it investigates other allegations of criminal misconduct. When a complaint raises a reasonable suspicion that a crime has been committed, the IDF opens a criminal investigation. If the investigation yields sufficient evidence to support the complaint, the IDF initiates either criminal or disciplinary proceedings, depending on the severity of the findings.

47. Information on alleged misconduct of soldiers reaches the IDF authorities in various ways, including:

- formal or informal complaints by alleged victims themselves or family members;
- complaints by commanders or soldiers who witnessed an incident;

- reports by non-governmental organisations and the news media;
- complaints or letters by non-governmental organisations, journalists, embassies, or international bodies; and
- complaints forwarded to or filed directly with the Military Advocate General's Corps by the Israeli Police and other law enforcement agencies.

48. Any person may file a complaint with the Military Police at any civilian police station regarding alleged misconduct by IDF soldiers. Gaza residents can file complaints directly in writing (in Hebrew, Arabic, and English), through a non-governmental organisation acting on their behalf, or through the Military Liaison that works directly with the Palestinian civilian population.

49. In addition, the IDF independently identifies incidents that warrant further inquiry, including allegations of military misconduct reported in the news media and by other sources. The Ministry of Justice also monitors such reports and brings allegations to the attention of the relevant bodies. Regardless of the source, the IDF evaluates each complaint based on the circumstances of the case and the evidence available.

B. Military Advocate General Screening and Referral

50. The Military Advocate General and the military prosecution play a major role in the IDF's system of investigating alleged violations of the Law of Armed Conflict. Such investigations are considered extremely important, and the Military Advocate General is personally involved in the examination of many cases. The military prosecution receives all complaints of IDF misconduct for screening and review, and directly refers any complaint that alleges *per se* criminal behaviour – including allegations of maltreatment of detainees, the use of civilians as human shields, intentional targeting of civilians and looting – to the MPCID for criminal investigation.

51. Other complaints – for example, allegations of civilian deaths due to artillery shelling or the destruction of civilian property on the battlefield – may or may not constitute a criminal offence, depending on the specific circumstances. Where hostilities occur in a heavily populated area, and where enemy combatants deliberately seek to blend in with the populace, civilian casualties, unfortunately, are inevitable. Under the Law of Armed Conflict, the occurrence of damage to civilian property, and of injury, or even death of civilians, during an operational activity does not necessarily indicate nor even imply

criminal misconduct.[37] Rather, criminal responsibility for violation of the Law of Armed Conflict requires evidence that military personnel *intended* to harm civilians or clearly foresaw that excessive harm to civilians would result, when balanced against the anticipated military advantage.[38]

52. Therefore, as to this second class of complaints, before initiating a criminal investigation, the Military Advocate General must first determine whether the evidence raises a suspicion of criminal activity and warrants a referral to MPCID. As discussed below, in making his decision, the Military Advocate General evaluates the complaint itself, which may include first-hand accounts from complainants and witnesses, along with the record of evidence developed during military command investigations (also known as operational debriefings) and other materials.

53. Some of Israel's critics have misunderstood the nature of these dual investigative tracks and incorrectly assumed that all complaints first must proceed through the command investigation stage, thereby delaying criminal proceedings for months. This premise – a

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[37] *See, e.g.*, Open Letter from Luis Moreno-Ocampo, Chief Prosecutor of International Criminal Court, "Allegations concerning War Crimes" at 4-5 (9 February 2006), *available at* http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf ("Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime."); Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, *in* YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 9 (Timothy L.H. McCormack ed., 2005) ("[A]lthough civilians are not to be directly made the object of an attack, humanitarian law accepts that they may be killed or civilian property may be damaged as a result of an attack on a military objective."); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 4 (1990) ("Within both the Just War Tradition and the law of war, it has always been permissible to attack combatants even though some noncombatants may be injured or killed . . . ."); Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS & DEV. L.J. 143, 150 (1999) (noting that international legal doctrine of proportionality "operates in scenarios in which incidental injury and collateral damage are the foreseeable, albeit undesired, result of attack on a legitimate target"); *see also* NATO BOMBINGS: FINAL REPORT TO THE ICTY PROSECUTOR ¶ 51 ("Collateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons.").

[38] *See, e.g.*, Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions 12 June 1949 (International Committee of the Red Cross, 1987), art. 51(2), ¶ 1934 ("[I]n relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result."); Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 675, 697 (Dieter Fleck ed., 2d ed. 2008) ("The prerequisite for a grave breach is intent; the attack must be intentionally directed at the civilian population or individual civilians, and the intent must embrace physical consequences."). The ICTY has found that for an attack to qualify as a war crime, it "must have been conducted *intentionally* in the *knowledge*, or when it was impossible not to know, that civilians or civilian property were being targeted." *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion ¶ 42 (5 December 2003), *quoted in* Watkin, *supra*, at 38.

central premise of the Human Rights Council Fact-Finding Report[39] – is wrong. The Military Advocate General and the military prosecution have full authority to initiate, and do initiate, direct criminal investigations of those complaints alleging conduct that is clearly criminal in nature. For example, in the case of the alleged firing of a rubber bullets at the feet of a detainee, the Military Advocate General conducted a direct criminal investigation immediately after the incident was published in the media, and filed an indictment within two weeks.[40] With respect to other complaints, those that are first subject to command investigations, there is no requirement that the Military Advocate General or military prosecution await a final report from the command investigator before making a criminal referral. At any point when there is a reasonable suspicion of criminal misconduct, the military prosecution may launch a criminal investigation.[41]

C. Command Investigations

54. Under the Military Justice Law, a command investigation is an "inquiry held in the army, in accordance with IDF orders, regarding an event which occurred during training or operational activity, or in relation to them."[42] The longstanding practice of the IDF, and many other militaries, is to conduct a command investigation in the field following any kind of military action. Such an investigation normally focuses on examining the performance of the forces and identifying aspects of an operation to preserve and to improve, but may also focus on specific problems that occurred. By undertaking this review, the IDF seeks to reduce future operational errors, including those potentially resulting in civilian casualties.

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[39] *See, e.g.*, Human Rights Council Fact-Finding Report ¶¶ 1820, 1831 (criticizing Israel's investigative process for "undue delay" because "proper criminal investigations can start only after the 'operational debriefing' is over"); *see also id.* ¶¶ 121, 1798, 1830.

[40] *Ashraf Abu Rahma v. Military Advocate General*, HCJ 7195/08 (1 July 2009). This case was discussed in Part II.B.2.

[41] The Human Rights Council Fact-Finding Report wrongly concluded that "in practice criminal investigations do not begin before six months after the events in question." Human Rights Council Fact-Finding Report ¶ 1830. As discussed below, the Military Advocate General directly initiated more than two dozen criminal investigations related to the Gaza Operation – all within six months. In fact, the Human Rights Council Fact-Finding Report discusses one of these investigations, which was completed less than two months after the Gaza Operation ended. *Id.* ¶ 1780; *see* "Military Police Investigation Concerning Statements Made at the Rabin Center: Based on Hearsay," IDF Press Release (30 March 2009), *available at* http://dover.idf.il/IDF/English/Press+Releases/09/03/3001.htm.

[42] Military Justice Law, § 539A(A).

55. But routine post-operation investigations are not the only inquiries conducted by the IDF. In addition to these inquiries, when a complaint is filed with the Military Advocate General which does not allege *per se* criminal behaviour, the Military Advocate General requests a command investigation, to compile an evidentiary record and make a preliminary assessment of the complaint. If warranted, the command investigation will also recommend remedial measures, such as disciplinary action (which can result in prison sentences).[43]

56. Under IDF Supreme Command Order 2.0702, the command investigator must transmit the complete record of a command investigation to the Military Advocate General's Corps upon request or automatically in certain types of cases – for example, whenever a civilian has been killed or seriously injured. The investigation of specific complaints as part of a command investigation thus serves not merely as a means to improve military performance but also as a preliminary inquiry on behalf of the Military Advocate General into potential military misconduct.

57. Further, the IDF's Chief of General Staff has the authority to initiate special (sometimes called "expert") command investigations for exceptional or complex cases. This type of investigation is conducted by a commanding officer who is outside the relevant chain of command. As with other command investigations, the results of a special command investigation must be transmitted to the Military Advocate General's Corps in appropriate circumstances – for example, whenever a civilian has been killed or seriously injured.

58. IDF Supreme Command Order 2.0702 provides requirements for command investigations, including:

- "The command investigator shall not be limited by the rules of evidence."
- "A soldier who is inquired in the course of a command investigation shall not be represented by a lawyer."

[43] The process of internal disciplinary action in the IDF is limited to less serious offenses (those with a maximum sentence of three years or less). The Military Advocate General's Corps may approve, change, or cancel a disciplinary judgment or punishment. Notwithstanding a disciplinary judgment, the Military Advocate General has the authority to approve a military indictment for the same offense. *See* Military Justice Law, § 171(B).

- "A soldier cannot refuse a demand by a command investigator to provide information, by testimony of other manner, even if he is entitled not to provide it to an investigating entity, since it might incriminate him."[44]

59. IDF Supreme Command Order 2.0702 further requires that all evidence obtained during a command investigation must be preserved. Specifically, "[m]aterials of a command investigation, including exhibits, maps, photos, and so on, shall be preserved by the commanding headquarters superior to the investigator." Thus, the Military Advocate General has the benefit of the entire record of a command investigation in those cases that are subject to review.[45]

60. Contrary to some criticisms – including those of the Human Rights Council Fact-Finding Report – command investigations do not substitute *de jure* or *de facto* for criminal investigations conducted by trained investigators.[46] They serve as a means of compiling an evidentiary record for the Military Advocate General, and enabling him, from his central vantage point, to determine whether there is a factual basis to open a criminal investigation. The Military Advocate General's review, not the command investigation, lies at the heart of the system. Many military systems rely on preliminary reviews, similar to command investigations, to assess complaints of soldier misconduct and to identify those that actually raise suspicions of criminal behaviour.[47]

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[44] A statement made by a soldier during a command investigation, like all the evidence gathered, is preserved as part of the record. The Military Advocate General may use such a statement as a reason to launch a criminal investigation. A statement may also form the basis for a disciplinary proceeding. However, as in other countries that recognize the right against self-incrimination, compulsory soldier statements during a command investigation are not admissible in court except when a soldier is charged with presenting false information or obstructing an investigation.

[45] Ignoring these IDF regulations and without citing any evidence, the Human Rights Council Fact-Finding Report falsely claims that command investigations "destroy the scene of the crime," making criminal investigations "nearly impossible." Human Rights Council Fact-Finding Report ¶ 1817; *see also id.* ¶ 1830 (noting that "evidence may be corrupted" by the time a criminal investigation is launched). While some investigations have experienced delays, due to the large number of complaints submitted after the Gaza Operation, the suggestion that evidence has been lost or destroyed as a result of the process of command investigations has no basis in fact.

[46] *See, e.g.*, Human Rights Council Fact-Finding Report ¶ 1819 (faulting command investigations for falling short of "established methods of criminal investigations such as visits to the crime scene, interviews with witnesses and victims, and assessment by reference to established legal standards").

[47] *See* Part III.E below.

61. The Israeli Supreme Court has recognized that command investigations are "usually the most appropriate way to investigate an event that occurred during the course of an operational activity."[48] Specifically, the Court observed that a command investigation is:

> "usually conducted close to the time of the event, when it is still fresh in the memory of those that take part in it. It is performed in a direct and non-cumbersome manner. It is an integral part of the whole operational activity and it is well rooted into the operational experience in the IDF since its very beginning."[49]

62. At the conclusion of a command investigation, the investigator submits a written report of the findings, along with any recommendations, to the commander who commissioned the investigation and up the chain of command. As noted, the final report, along with any evidence collected, must also be transmitted to the Military Advocate General's Corps upon request or automatically in certain instances – for example, whenever a civilian has been killed or seriously injured.

D. Criminal Investigations and Prosecutions

63. The MPCID conducts criminal investigations, including investigations of complaints alleging that soldiers violated the Law of Armed Conflict. As noted above, the Military Prosecution automatically refers any complaint alleging *per se* criminal conduct to the MPCID for direct criminal investigation. With respect to other complaints, the Military Advocate General initiates a criminal investigation once he finds a reasonable suspicion of criminal activity.[50]

64. To make this determination, the Military Prosecution generally relies on the complaint itself (including any statements submitted by the complainant or witnesses) together with the report and record of a command investigation. In many cases, the Military Prosecution reviews additional materials, such as reports by non-governmental organisations and media accounts. The Military Prosecution can – and in many instances does – request additional information from the command investigator, including a supplemental investigation.

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[48] *Mor Haim v. Israeli Defence Forces*, HCJ 6208/96 (16 September 1996). This case dealt with the appropriate manner for investigating the circumstances of the death of a soldier during an IDF operation.

[49] *Id.*

[50] When a command investigation precedes a criminal investigation, the Military Advocate General has to consult with an officer ranked Major or above. Nevertheless, the Military Advocate General alone has the authority to decide whether to initiate a criminal investigation and no officer has the authority to veto his decision.

65. The Military Prosecution notifies the complainant of his decision whether to open a criminal investigation, including an explanation of the reasons. As noted, the complainant can appeal the decision both to the Attorney General and the Supreme Court.

66. When a criminal investigation is opened, the MPCID consults as needed with the relevant Military Advocate (in cases involving alleged operational misconduct against Palestinians, the Military Advocate for Operational Affairs) regarding professional and legal questions.

67. When the MPCID completes its criminal investigation, the military prosecution reviews the evidence and decides whether to file an indictment. The military prosecution exercises prosecutorial discretion according to Israeli law – similar to any prosecutor in Israel or other common law states. For example, the military prosecution will file an indictment only if it determines that there is sufficient evidence to obtain a conviction. A complainant retains the right to appeal a decision of the military prosecution. The military prosecution's exercise of prosecutorial discretion in individual cases is subject to review by both the Attorney General and the Supreme Court.

68. From January 2002 through December 2008, there were 1,467 criminal investigations into alleged misconduct by IDF soldiers, leading to 140 indictments against soldiers for alleged crimes committed against the Palestinian population. Of these indictments, as of December 2008, 103 defendants were convicted and ten cases are still pending. During 2009, 236 criminal investigations were opened, and 14 indictments were filed against officers and soldiers.

69. Historically, the Military Advocate General's Corps has aggressively prosecuted cases of soldier misconduct toward Palestinian civilians. For example, last year the military prosecution indicted a Lieutenant and a Sergeant for the improper use of force while questioning civilians during a military operation in the West Bank. A military Court Martial convicted the Lieutenant of aggravated assault, for both his own use of force as well as the use of force by his subordinate.[51]

70. In *Lt. Col. Geva v. Chief Military Prosecutor*, the Military Advocate General's Corps filed an appeal to seek a harsher sentence for a senior officer convicted of threatening the child of a suspected terrorist and using a civilian as a human shield. The Military Court of Appeals sided with the prosecution:

[51] *Military Prosecutor v. Lt. A.M. and Sgt. A.G.*, C/125+126/09. The Lieutenant is awaiting his sentencing hearing.

> "The requirement of 'personal example' by IDF commanders has been, from time immemorial, at the heart of military leadership which adopted the heritage of Gideon: 'Look on me and do likewise.' (Judges 7). The example given by the respondent to his subordinates, to the IDF and to society in general has been negative and the harm caused – both at home and abroad – is probably irretrievable. Given the seriousness of the failure, . . . a clear and distinct statement is warranted."[52]

E. The Similar Investigatory Systems of Other States

71. Under international law, the responsibility to investigate and prosecute alleged violations of the Law of Armed Conflict by a state's military forces falls first and foremost to that state.[53]

72. International law does not indicate the precise manner or pace at which a state should investigate alleged violations of the Law of Armed Conflict. As commentators have noted, "states do seem to enjoy broad discretion (subject to good faith requirements) in conducting ex post investigations in situations where human rights or IHL [international humanitarian law] had been allegedly breached."[54]

73. Nonetheless, the investigative systems in Israel and other democratic states (in particular, those based on the Common Law tradition) appear to have several similarities. Like Israel, countries such as the United Kingdom, the United States, Australia, and Canada have processes to screen for Law of Armed Conflict and other complaints that warrant criminal investigation, including the use of preliminary military reviews (comparable to command investigations), to assist in that determination.[55] These countries also use a courts-martial

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[52] *Lt. Col. Geva v. Chief Military Prosecutor*, A/153/03 ¶ 50 (5 August 2004).

[53] *See* Informal Expert Paper, *The Principle of Complementarity In Practice*, at 3, *available at* http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf ("States have the first responsibility and right to prosecute international crimes.").

[54] Amichai Cohen and Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killing Case*, 5 J. INT'L CRIM. JUS. 310, 318 (2007). The Human Rights Council Fact-Finding Report recognizes these principles. The Report notes that "the responsibility to investigate violations of international human rights and humanitarian law, prosecute if appropriate and try perpetrators belongs in the first place to domestic authorities and institutions"; and that "international justice mechanisms" should only intercede "where domestic authorities are unable or unwilling to comply with this obligation." Human Rights Council Fact-Finding Report ¶ 1760.

[55] *See, e.g.*, Aitken Report, *An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*, 25 January 2008, *available at* http://mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf (hereafter "Aitken Report") (describing the procedures for investigating

[Footnote continued on next page]

system based within the military justice framework to adjudicate criminal indictments alleging violations of the Law of Armed Conflict.[56]

74. When investigating high profile or other alleged incidents of soldier misconduct, these countries, like Israel, have sometimes encountered criticism concerning the pace at which their investigations or prosecutions have proceeded.

75. While there is no question that investigators should move expeditiously, the key imperative is that they take the time necessary to conduct a thorough and professional inquiry and to uncover the truth. Investigators should not sacrifice careful, complete examination of the facts nor adherence to the principles of due process.

(1) United Kingdom

76. The United Kingdom uses both criminal investigations and independent investigations within the military to examine alleged violations of the Law of Armed Conflict.[57] The Army Prosecuting Authority (APA) (which has recently been consolidated into a service-wide Prosecution Authority) traditionally has dealt with cases referred to it by the army chain of command.[58] "Legal advice is available for commanding officers and higher authorities to assist with decisions on referring appropriate cases to the APA."[59] The Director of Army Legal Services (ALS), who is appointed by the Queen as the APA, "has responsibility for decisions on whether to direct trial for all cases referred by the military chain of command, and for the prosecution of all cases tried before courts-martial, the Standing Civilian Court and the Summary Appeal Court and for Appeals before the Courts-Martial Appeal Court and the House of Lords."[60]

[Footnote continued from previous page]
violations of the Law of Armed Conflict in the United Kingdom); Dept. of Defense Directive No. 2311.01E, *Dept. of Defense Law of War Program*, 9 May 2006 (setting forth the procedures for the investigation of "reportable incidents" regarding of the Law of Armed Conflict in the United States).

[56] *See, e.g.*, Victor Hansen, *Changes Made in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn From this Revolution*, 16 TUL. J. INT'L & COMP. L. 419 (2008) (describing U.S., Canadian, and United Kingdom court martial systems).

[57] *See generally* Aitken Report.

[58] *See* HM Crown Prosecution Inspectorate's Follow-Up Report on the Army Prosecuting Authority, February 2009, at 1.

[59] Aitken Report ¶ 28.

[60] *Id.*

77. The Director of ALS delegates these decision-making functions to "ALS officers appointed as prosecutors in the APA."[61] As in Israel, "[t]he APA is under the general superintendence of the Attorney-General and is, rightly, independent of the Army Chain of Command."[62] The APA (and new consolidated Prosecuting Authority) can decide not to institute court martial proceedings, refer the case back to the commanding officer to address, or direct a trial by court martial.[63] Like the Military Advocate General, the Director General of ALS is responsible both for providing legal advice to the army chain of command and for prosecution of offenders.[64]

78. For those incidents that do not warrant direct referral to the APA, the United Kingdom military investigates allegations of misconduct within its military justice framework through administrative actions, informal investigations, or formal investigations ordered by a Board of Inquiry.[65]

(2) United States

79. To respond to alleged violations of the Law of Armed Conflict, the United States grants multiple actors within the Department of Defense and the military branches independent authority to order an investigation.[66] Specifically, the investigatory procedures in the United States follow the same general practice as in Israel. When a "reportable incident"[67] involving the Law of Armed Conflict occurs, the appropriate field commander has the duty to report the incident up the chain of command immediately.[68] Commanders receiving information about an alleged Law of Armed Conflict violation conduct a formal, or more often informal, investigation to collect evidence and assess the credibility of the

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[61] *Id.*

[62] *Id.*

[63] *See* HM Crown Prosecution Inspectorate's Follow-Up Report, *supra*, at 1.

[64] *See* British Army Website, *Army Legal Services*, *available at* http://www.army.mod.uk/agc/9935.aspx.

[65] Aitkin Report ¶ 36. Formal and informal investigations can be independent of the chain of the command but are conducted within the military.

[66] *See* Dept. of Defense Directive No. 2311.01E, *Dept. of Defense Law of War Program* (9 May 2006). Although the Defense Department Law of War Program Directive establishes comprehensive procedures for investigating incidents related to the Law of Armed Conflict, as developed below, investigations are typically ordered by military commanders or military investigation agencies.

[67] A "reportable incident" is defined as "[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict." *See* CJCSI 5810.01C ¶ 5(b).

[68] *See* Dept. of Defense Directive No. 2311.01E ¶¶ 6.3-6.8; CJCSI 5810.01C ¶ 7(a)-(b).

allegations to determine whether a crime has been committed.[69] The report then both moves up the chain of command to the relevant Commander of the Combatant Command, and goes to the appropriate military investigation agency to determine whether to initiate a criminal investigation, as well as to the General Counsel of the Department of Defense.[70]

80. One recent example of this process is the investigation of a U.S. military engagement with Taliban insurgents in Afghanistan, which resulted in civilian casualties. There, "U.S. military elements in Afghanistan began a preliminary inquiry" of the incident.[71] After the preliminary inquiry, the Commander of U.S. Central Command "directed a U.S. Army General from outside Afghanistan to conduct a full investigation" who later presented his final report to the Commander and key leaders. The investigating officer's findings and recommendations, which found no violation of the Law of Armed Conflict but suggested operational improvements, were approved by the Commander.

81. Criminal investigations of soldier misconduct in the United States are conducted by, among others, the United States Army Criminal Investigation Command (USACIDC).[72] The USACIDC's investigative responsibilities include alleged war crimes and in some cases crimes against coalition forces and host nation personnel.[73] The USACIDC does not impose time tables for investigations. Rather, like Israel, it takes the time needed to conduct a professional inquiry:

> "Criminal investigations take as long as required to get to the truth and determine exactly what transpired in a particular circumstance. Although time is very important, criminal investigations are conducted to a standard not necessarily to a timetable. CID is dedicated to conducting thorough and professional criminal investigations no matter how long it takes."[74]

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[69] *See* U.S. Dept. of Navy, JAG Inst. 5800.7D, Manual of the Judge Advocate General, ch 11 (15 March 2004); U.S. Dept. of Army, Reg. 15-6, Procedures for Investigating Officers and Boards of Officers (2 November 2006).

[70] *See* Dept. of Defense Directive No. 2311.01E ¶ 6.5.1-2; CJCSI 5810.01C ¶ 7(c).

[71] UNCENTCOM's Unclassified Executive Summary, *U.S. Central Command Investigation into Civilian Casualties in Farah Province, Afghanistan on 4 May 2009.*

[72] U.S. Army Criminal Investigation Command website, *available at* http://www.cid.army.mil/mission.html.

[73] *Id.*

[74] U.S. Army Criminal Investigation Command frequently asked questions website, *available at* http://www.cid.army.mil/faqs.html.

82. If an investigation reveals evidence of criminal wrongdoing, the ensuing criminal proceeding in the American system is a court-martial similar to the proceedings in Israel. Military prosecutors, known as Judge Advocates, are free from command influence, although as a matter of organizational structure they are subordinate to the command authority. Judge Advocates advise the "Convening Authority"[75] whether to refer cases to a court martial for trial and to approve, modify, or disapprove the findings and sentences in court martial proceedings.[76] Unlike in Israel, Judge Advocates in the United States do not file cases on their own[77] and the U.S. system does not provide for independent judicial review of the decision to commence or not commence a criminal proceeding.

(3) Australia

83. Under the Australian legal system, upon receipt of a complaint alleging soldier misconduct, a commander or supervisor may direct what is called a Quick Assessment (QA) of the incident. A QA has a similar purpose to the Israeli initial command investigation as it is conducted to determine whether there is any substance to allegations that may warrant further investigation or inquiry.[78]

84. The Quick Assessment Officer (QAO) conducts informal interviews, collects evidence, and issues a report and recommendation. The QAO can recommend no further inquiry if he or she finds insufficient evidence of a violation of the Law of Armed Conflict or other law. Alternatively, depending on the nature of the alleged violation, the QAO can recommend a Military Commission Board of Inquiry, an Inquiry Officer inquiry, or a Routine Inquiry (all of which are conducted within the military).

85. When the QA indicates a concern regarding criminal wrongdoing, the QA Officer will recommend a criminal investigation by the Australian Defence Force Inquiry Services

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[75] "Convening Authority" is defined to include "a commissioned officer in command for the time being and successors in command." Manual for Courts-Martial United States (2008 ed.), Rules for Courts-Martial ("R.C.M.") 103(6), *available at* http://www.jag.navy.mil/documents/mcm2008.pdf.

[76] Uniform Code of Military Justice, Art. 34, Art. 64, *available at* http://www.army.mil/references/UCMJ/. As with the Military Advocate General, Judge Advocates are responsible both to provide legal advice to the military chain of command and to prosecute UCMJ offenders. *See* U.S. Army JAG website, *available at* http://www.goarmy.com/JobDetail.do?id=318 (providing that JAG officers "[p]rosecute criminal cases under [UCMJ]" and "[a]dvise commanders of all levels on all legal issues as they arise"); U.S. Air Force JAG website, *available at* http://www.afjag.af.mil/shared/media/document/AFD-080502-052.pdf (similar).

[77] *See* R.C.M. 401, 504, 505, 601, 1107, *available at* http://www.jag.navy.mil/documents/mcm2008.pdf.

[78] *See* The Defence Instructions (General) - Quick Assessment (Defence Instructions), Admin 67-2 (7 August 2007), *available at* http://www.defence.gov.au/fr/Policy/ga67_02.pdf.

(ADFIS). The recommendation is referred and reviewed up the chain of command. If the matter is referred to the ADFIS, it in turn may investigate and send the matter to a hearing before a Defence Force Magistrate or a Commanding Officer or may refer the incident to the civilian police.

(4) Canada

86. Under Canada's system, complaints alleging a *prima facie* violation of the Law of Armed Conflict during an operational activity generally are referred to the National Investigation Service (NIS).[79] The NIS is accountable to the Canadian Forces Provost Marshal.[80] The NIS's mandate is to investigate "serious and sensitive matters," including alleged violations of the Law of Armed Conflict, concerning Canadian Forces serving in Canada and abroad.[81] If NIS becomes aware of allegations of a potential criminal offence (through regular military police or through complaints from members of the Canadian forces or other sources), it reviews the information to determine whether a NIS investigation should be conducted.[82] If the allegation does not appear to meet the "serious or sensitive" standard, it can be investigated by non-NIS military police or by the command unit. Prosecutions for serious charges are carried out by the Canadian Military Prosecution Service (CMPS), which is answerable to the Director of Military Prosecutions (DMP). The DMP reports to the Judge Advocate General (JAG) but exercises his or her duties and functions independently.[83] The CMPS provides legal advice to NIS military police, reviews charge for court martial (including on grounds of sufficiency of evidence) and conducts prosecution of trials by court martial.[84]

87. Matters that do not initially indicate criminal wrongdoing go to either Summary Investigations (SI) if they are minor or uncomplicated, or to a military Board of Inquiry

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[79] *See* Canadian Forces National Investigation Service, Annual Report 2007, dated 11 March 2008, at 11, *available at* http://www.vcds.forces.gc.ca/cfpm-gpfc/cfp-ggp/nis-sne/ar-ra/2007/doc/nisar-snera-2007-eng.pdf.

[80] The Canadian Forces National Investigation Service, CFNIS 2009-02, 1 May 2009, *available at* http://news.gc.ca/web/article-eng.do?m=/index&nid=446989.

[81] The Investigation and Charging Process in the Military Justice System (National Defence Canada), *available at* http://www.forces.gc.ca/jag/publications/Training-formation/ChargInves-EnqueAccu-eng.pdf.

[82] The Canadian Forces National Investigation Service, CFNIS 2009-02, 1 May 2009.

[83] Abridged Annual Report of the Director of Military Prosecutions, 2006-7, *available at* http://www.forces.gc.ca/jag/publications/DMP-DPM/DMP-DPM-AR0607-eng.pdf.

[84] Abridged Annual Report of the Director of Military Prosecutions, 2006-7.

(BOI) if they are more complex.[85] If either an SI or BOI receives evidence that reasonably relates to an allegation of criminal conduct, the proceedings must be suspended for potential criminal investigations.[86] In a BOI, a soldier can be compelled to testify, but as in Israel's command investigations, any self-incriminatory statements are inadmissible as evidence against the soldier in a court martial or trial.[87]

(5) Summary

88. In sum, these military justice systems share similarities with the system in Israel. They rely on a combination of field reviews, informal and formal military investigations, and prosecutions by courts martial or their equivalent. While these other systems differ in some respects from each other and from the Israeli system, all of them nonetheless have been accepted worldwide as sufficient for investigating alleged violations of the Law of Armed Conflict. The comparisons also reflect that investigations into alleged violations of the Law of Armed Conflict can take several weeks, months, or even years. The length of time is contingent on a variety of factors and customary international law does not reflect a standard pace for conducting such investigations, much less a deadline that Israel has exceeded.

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[85] *See* National Defence and the Canadian Forces, Defence Administration Orders and Directives ("DAOD") 7002-1, 8 February 2002 (as modified 7 May 2007), *available at* http://www.admfincs.forces.gc.ca/dao-doa/7000/7002-1-eng.asp (purpose of BOI is "to investigate and report on matters of unusual significance or complexity"); DAOD 7002-2 8 February 2002 (as modified 7 May 2007), *available at* http://www.admfincs.forces.gc.ca/dao-doa/7000/7002-2-eng.asp (purpose of SI is "to investigate and report on matters of a minor, straightforward and uncomplicated nature").

[86] DAOD 7002-1; 7002-2 (providing that terms of reference for both SI and BOI must contain paragraphs stating "Should the BOI receive evidence that it reasonably believes relates to an allegation of a criminal act or a breach of the Code of Service Discipline, the BOI shall adjourn, the convening authority shall be notified, and the matter shall be referred to the nearest JAG representative for advice."). Like the Military Advocate General, the Canadian Judge Advocate General is responsible both to provide legal advice to the military chain of command and to prosecute criminal offenders. *See* National Defence and the Canadian Forces JAG website, *available at* http://www.forces.gc.ca/jag/office-cabinet/law-droit-eng.asp (providing that the JAG is responsible for being "legal advisor . . . to the Canadian Forces" on a number of issues, including "international and operational law" and "criminal law and military justice policy," and for "[p]referral of charges for tr[ia]l at courts martial" and "[p]rosecutions at courts martial").

[87] *Meade v. Her Majesty the Queen in Right of Canada* [1991] 3 F.C. 365 ¶ 9.

IV. COMPLAINTS ALLEGING VIOLATIONS OF THE LAW OF ARMED CONFLICT DURING THE GAZA OPERATION

89. Israel is aware of concerns raised regarding the Gaza Operation. As discussed in detail in *The Operation in Gaza*, and as outlined above, the deliberate strategy of Hamas to blend in with the civilian population made it difficult for the IDF to achieve the objective of the Gaza Operation – reducing the threat of deliberate attacks against Israeli civilians – while also avoiding harm to Palestinian civilians. To be sure, the IDF undertook strenuous efforts to minimise such harm. It intensively trained its personnel on the requirements of the Law of Armed Conflict. It delayed, diverted, or refrained from attacks to spare civilian life. It provided numerous and varied types of concrete warnings before launching attacks.[88] Nevertheless, Israel's efforts to comply with the Law of Armed Conflict do not lessen its regret for the loss of innocent lives and damage to civilian property.

90. Following the Gaza Operation, Israel took several concrete steps to reaffirm its commitment to thoroughly investigating, and where appropriate, prosecuting, alleged violations of the Law of Armed Conflict:

- Israel undertook to investigate every specific complaint of alleged violations during the Gaza Operation, regardless of the credibility of the source.
- The Military Advocate General personally reviewed each complaint submitted and, when available, the record of each command investigation before deciding whether to initiate a criminal investigation.
- The Chief of General Staff initiated six special command investigations to examine some of the most serious allegations, in addition to the other command investigations conducted.[89]
- The Military Advocate General ordered the Office of the Military Advocate for Operational Affairs to work closely with the MPCID on every criminal investigation, even before any decision on whether to file charges.

91. At the time of this Report, the IDF has investigated or is currently investigating more than 150 separate incidents that allegedly occurred during the Gaza Operation involving violations of the Law of Armed Conflict. The IDF initiated many of these investigations based on its own sources of information. Others came to the attention of the Israeli

[88] *See The Operation in Gaza: Factual and Legal Aspects* ¶¶ 262-65.

[89] Five special command investigations were initiated immediately after the conclusion of the Operation, and an additional special command investigation was initiated on 10 November 2009.

authorities through a variety of channels, either directly via complaints submitted by Palestinians and non-governmental organisations, or indirectly through media accounts and reports published by non-governmental organisations and other sources (among them, the Human Rights Council Fact-Finding Report).

92. The pace of these investigations reflects an orderly approach to uncovering the facts while at the same time safeguarding the rights of civilians and military personnel. Ideally, investigations would begin earlier, end sooner, and yield irrefutable results. But the combat and immediate post-combat environment is not ideal, and it complicates the gathering of evidence and the conduct of investigations. While the Gaza Operation concluded only one year ago, a thorough investigation takes time.

93. The unique difficulties involved in the investigation of alleged violations of the Law of Armed Conflict in the battlefield should not be ignored. They include: the inability to secure the scene for forensic and physical evidence, either during a battle or after, when the territory is under enemy control; the possible destruction of evidence during fighting and the possible manipulation of the scene by the enemy; the need to recall reserve soldiers back for questioning; the difficulty of accurately identifying the location of an incident, when it is described in local and unofficial terms and slang; and the need to locate the adversary's civilians as witnesses and overcome their natural suspicion and fear of reprisals by their authorities.[90]

94. Despite these complexities, the IDF has made significant progress with the investigations and concluded many of them. To date, some investigations have resulted in prosecutions for disciplinary and criminal violations. In others, the preliminary command investigations have been concluded and the Military Advocate General is undertaking his own review to determine whether the record warrants further investigation. In some cases, the Military Advocate General found no evidence of wrongdoing and closed the investigation. As many of the investigations are subject to further review by the Military Advocate General, the Attorney General, and the Supreme Court, it is possible that different conclusions will emerge as these cases advance through Israel's justice system.

[90] As discussed below, the MPCID has interviewed almost 100 Palestinians at the Erez border crossing point principally by working with non-governmental organisations acting as liaisons with the civilian population of Gaza.

95. Israel has periodically released detailed information concerning the status of its investigations into the Gaza Operation.[91] Current information about these investigations is provided in the following sections.

A. Command Investigations

(1) Five Special Command Investigations Opened Upon the Conclusion of the Gaza Operation

96. On 20 January 2009 – just two days after the conclusion of the Gaza Operation – IDF Chief of General Staff Lt. Gen. Ashkenazi ordered five special command investigations into a range of allegations raised by international and non-governmental organisations and various news media. To head the investigations, he appointed five Colonels with substantial field and command expertise who were not directly involved with the incidents investigated or in the direct chain of command. These investigations were not routine field reviews. Rather, the mandates focused on five types of alleged violations of the Law of Armed Conflict, encompassing 30 individual incidents:

- Claims regarding incidents in which a large number of civilians not directly participating in the hostilities were harmed;[92]

- Claims regarding incidents where U.N. and international facilities were fired upon and damaged during the Gaza Operation;[93]

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[91] *See, e.g., The Operation in Gaza: Factual and Legal Aspects*. Israel also posts information concerning the investigations at the Ministry of Foreign Affairs website, *available at* http://www.mfa.gov.il/MFA.

[92] The Chief of General Staff's mandate was very specific about the allegations to be investigated, requiring review of, for example, the "Attack of a senior Hamas operative Nizar Rian, allegedly resulting in the death of 15 other individuals (4 January)," "Attack of the mosque in Beit Lahia, allegedly resulting in the death of 8 individuals (3 January)," and "Attack of the mosque of Imad Aq'al, allegedly resulting in the death of 7 individuals, 4 of them minors (29 December)." The mandate provided details, when available, such as dates, location, family names and relationships, and the number and gender of individuals allegedly killed. The mandate also required an investigation into the "[d]etails regarding the orders and instructions given in the IDF (on different levels of command before and during the operation) and regarding avoidance of disproportional harm to civilians not taking active part in the hostilities, regarding safety ranges from such civilians in different circumstances and using different weapons."

[93] The Chief of General Staff's mandate identified with specificity four alleged incidents to be investigated – for example, the "Shooting towards Fakhura school in Jabaliyah (6 January)," and "Damage to the UNRA school as a result of a strike by the air force, allegedly resulting in the death of 3 individuals." The mandate also required investigators to gather "information regarding intentional use by Hamas of UN premises or facilities for cover or as cover for shooting" and the "information regarding the orders and

[Footnote continued on next page]

- Incidents involving shooting at medical facilities, buildings, vehicles and crews;[94]
- Destruction of private property and infrastructure by ground forces;[95] and
- The use of weaponry containing phosphorous.[96]

97. The investigations focused not merely on improving operational performance, but rather on assessing specific incidents of harm to civilians and protected persons or facilities. The

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instructions given in the IDF (by different command levels, before and during the operation) regarding avoidance of harm to UN and international organizations' premises, facilities, vehicles and teams." This mandate was later extended to include other incidents investigated by the United Nations Headquarters Board of Inquiry in the Gaza Strip between 27 December 2008 and 19 January 2009.

[94] The Chief of General Staff's mandate required investigations into seven specific alleged incidents, such as the "Hitting of a medical team on its way to aid a wounded bleeding person in the area of Jabel Kashef, in the north-eastern area of the Gaza Strip, resulted in the death of a doctor, Dr. Ihmad Madhoun, the paramedic Abu Hesri, and the 1 wounded person (31 December)," and "Shelling of Dababish family residence in Sheikh Raduan, during a time when the medical team was at the location in order to evacuate the wounded, as a result of which one member of the medical team was killed (3 January)." With regard to each of these incidents, the mandate directed that the investigations seek "information regarding shooting incidents from within or nearby medical premises, facilities or vehicles, and regarding intentional use by Hamas of medical premises, facilities and vehicles for the purpose of fighting, cover for shooting, movement of weapons and combatants" and the "[d]etails regarding the orders and instructions given in the IDF (on different command levels, before and during the operation) regarding avoidance of harm to medical premises, facilities, vehicles and medical teams."

[95] The Chief of General Staff's mandate required investigations into the following issues: "a. Orders and instructions given and determined by different command levels (from the headquarters to the ground forces, before and during the operation), regarding the destruction of buildings and infrastructure. b. Extent of destruction of buildings and infrastructure in the different areas, divided in accordance to: stages of the operation, operating units, types of buildings or infrastructure that were damaged, purposes of destruction, the manner in which the destruction was carried out (via engineers/method of destruction/verification of evacuation of residents) and whether the destruction was planned or spontaneous by decisions which were taken in the field in 'real time'. c. Intelligence and operational information regarding the nature of the enemy's offensive and defensive methods, and with regard to infrastructure of the enemy that was identified and documented by our forces, which support the operational necessity of destruction."

[96] The Chief of General Staff's mandate required investigations into the following issues: "a. Kinds and amount of weapons containing phosphorous, allocated to the forces before and during the operation. b. Kinds and amount of weapons containing phosphorous, actually used during the operation. c. Purpose and military needs for the use of weapons which contain phosphorous (for example – smoke screening, marking), the targets at which these weapons were fired (for example – open areas, sources of fire in built up areas), all this divided in accordance with the type of weapon. d. Professional instructions which exist with regard to every kind of these weapons. e. Rules of engagement relevant to every type of these weapons, including safety ranges which apply with regard to the firing of weapons which contain phosphorous (specifically, the existence of limitations of any kind on the firing of these weapons to populated areas). f. Deviations (if there were) from the instructions and orders with regard to the use of weapons which contain phosphorous, and the core reasons behind such exceptions."

mandates directed the command investigators to conduct detailed inquiries into, among other things, "the orders and instructions given in the IDF (at different levels, before and during the operation) regarding the avoidance of harm" – including instructions regarding "avoidance of disproportional harm to civilians not taking active part in the hostilities, regarding safety ranges for the use of different weapons from such civilians in different circumstances."

98. In accordance with standard IDF procedures for command investigations, the investigators operated independently and had access to all available materials as well as the freedom to question any relevant IDF personnel. They interviewed numerous soldiers and officers, and gathered relevant documents and other materials from external sources. They reviewed operational logs, video footage and photographs from aerial vehicles, fragment analysis reports, internal military debriefings, intelligence documents, relevant rules of engagement and operational plans, and volumes of other relevant materials. Each soldier interviewed was required to cooperate with the investigation, and each did so.

99. The special investigations revealed some instances of intelligence and operational errors. For example, one special command investigation determined that the IDF mistakenly targeted the home of the Al-Daya family rather than a neighbouring weapons storage facility, resulting in civilian deaths. In another instance, where the lead car of a UNRWA convoy was fired upon, the investigation revealed communication errors in coordinating the movement of the convoy. To avoid these types of errors in the future, IDF Chief of General Staff Lt. Gen. Gabi Ashkenazi directed that certain standing orders be highlighted or clarified and ordered improvements in certain command operations.

100. The special command investigations also uncovered some instances where IDF soldiers and officers violated the rules of engagement. For example, in one case, a Brigadier General and a Colonel had authorized the firing of explosive shells which landed in a populated area, in violation of IDF orders limiting the use of artillery fire near populated areas. The Commander of the Southern Command disciplined the two officers for exceeding their authority in a manner that jeopardized the lives of others.

101. Upon completion of the special command investigations, the investigators presented their findings to the IDF Chief of General Staff, Lt. Gen. Gabi Ashkenazi, who adopted their recommendations.[97] The Chief of General Staff ordered the IDF to implement lessons

[97] *See* IDF Spokesperson Announcement, *Conclusion of Investigations into Central Claims and Issues in Operation Case Lead* (22 April 2009), *available at* http://idfspokesperson.com/2009/04/22/idf-announcement-findings-from-cast-lead-investigations/.

learned on a broad range of matters, directing that certain standing orders be highlighted or clarified, establishing further guidelines on the use of various munitions, and instructing that steps be taken to improve coordination with humanitarian organisations and entities.

102. The Military Advocate General received the findings and evidentiary record of each special command investigation as a source of factual information to assist in the analysis of the relevant allegations. On 19 January 2010, the Military Advocate General issued his opinion, which addressed each of the five special command investigations.

(i) Claims regarding incidents in which a large number of civilians not directly participating in the hostilities were harmed

103. The investigation into these allegations included 7 separate incidents. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.[98]

104. As to 4 of the incidents, the Military Advocate General completed his investigation and review, finding no grounds to open a criminal inquiry.[99] The investigations with regard to three incidents are still underway.[100] In 2 instances, due to the complexity of the circumstances, the special command investigation is still ongoing. The third incident involved the alleged strike on the Al Maquadme Mosque, which the Chief of General Staff had remanded for a new special command investigation (as discussed below).

(ii) Claims regarding incidents where U.N. and international facilities were fired upon and damaged during the Gaza Operation

105. The investigation into these allegations included 13 separate incidents. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.[101]

106. The Military Advocate General reviewed the findings and entire record of this special command investigation. He also reviewed additional materials, including information in the Human Rights Council Fact-Finding Report and the Report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip Between 27 December 2008 and 19 January 2009.

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[98] *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 381-403.

[99] The four incidents are: the attack resulting in the death of Hamas senior operative Nizar Ri'an and allegedly 15 other individuals; alleged attack of the mosque of Al Rabat; attack of a truck carrying oxygen tanks; and attack of Dr. Abu El Eish family residence.

[100] The three incidents are: the alleged attack of the Mosque of Imad Aq'al; the strike of the Al Daiya family residence; and the alleged attack of Al Maquadme Mosque.

[101] *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 330-69.

107. The Military Advocate General found no basis to order criminal investigations of the thirteen incidents under review. With regard to two of these incidents, the Military Advocate General affirmed the decisions to pursue disciplinary proceedings against IDF personnel.

108. One of these incidents involved alleged damage to the UNRWA field office compound in Tel El Hawa.[102] The special command investigation revealed that, during the course of a military operation in Tel El Hawa, IDF forces fired several artillery shells in violation of the rules of engagement prohibiting use of such artillery near populated areas. Based on these findings, the Commander of the Southern Command disciplined a Brigadier General and a Colonel for exceeding their authority in a manner that jeopardized the lives of others.

109. As noted in *The Operation in Gaza*, the United Nations Secretary General established a Board of Inquiry to examine a number of incidents involving damage to U.N. facilities, independent of the ongoing investigations in Israel. Israel cooperated fully with U.N. Board of Inquiry, sharing the results of its internal investigations and providing detailed information about the incidents in question. The Secretary General commended Israel for its extensive cooperation.[103]

110. Following the U.N. Board of Inquiry's examination, and notwithstanding certain reservations it had with some aspects of the Board's report, Israel entered into a dialogue with the United Nations to address all issues arising from the incidents examined. On 22 January 2010, the Secretary General thanked Israel for its "cooperative approach" in these discussions and confirmed that all financial issues relating to these incidents had been satisfactorily concluded.[104]

(iii) Incidents involving shooting at medical facilities, buildings, vehicles and crews

111. The investigation into these allegations included 10 separate incidents. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.[105]

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[102] *Id.* ¶¶ 341-47.

[103] *See* Letter from the Secretary General to the President of the Security Council (4 May 2009), *available at* http://www.unhcr.org/refworld/docid/4a292c8dd.html (expressing "appreciation for the cooperation provided by Israel to the Board").

[104] U.N. Spokesperson Briefing (22 January 2010), *available at* http://www.unmultimedia.org/radio/english/detail/89687.html.

[105] *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 370-80.

112. The Military Advocate General found no basis to order criminal investigations of the 10 incidents under review.

(iv) Destruction of private property and infrastructure by ground forces

113. This investigation dealt with the general allegations that the IDF intentionally destroyed private property and civilian infrastructure during the Gaza operation. The investigation did not deal with specific incidents alleged in complaints or reports. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.[106]

114. The Military Advocate General reviewed the findings and the entire record of the investigation. The Military Advocate General noted that according to the Law of Armed Conflict, the destruction of private property is prohibited, except where such a destruction is justified by military necessity. He also emphasised that the findings of the special investigation are consistent with Israel's obligations under the Law of Armed Conflict. In this regard, the Military Advocate General noted that the extent of destruction, by itself, cannot establish a violation of the Law of Armed Conflict.

115. Because this investigation was limited in scope and dealt with overall issues, specific incidents reported after the conclusion of the special command investigation have been referred to individual command investigations. The Military Advocate General stressed the importance of a thorough investigation of each such incident.

116. The Military Advocate General further emphasised the importance of clear regulations and orders, as well as clear combat doctrine, regarding the demolition of structures and infrastructure. The IDF has already adopted such regulations and combat doctrine.

(v) The use of weaponry containing phosphorous

117. This investigation dealt with the use of weapons containing phosphorous by IDF forces during the Gaza Operation. The investigation focused on the different types and number of weapons containing phosphorous used during the Operation, the purposes for which they were used, the applicable professional instructions and rules of engagement, and the extent of compliance with those instructions and rules. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.[107]

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[106] *Id.* ¶¶ 436-45.

[107] *Id.* ¶¶ 405-35.

118. The Military Advocate General reviewed the entire record of the special command investigation. With respect to exploding munitions containing white phosphorous, the Military Advocate General concluded that the use of this weapon in the operation was consistent with Israel's obligations under international law.

119. With respect to smoke projectiles, the Military Advocate General found that international law does not prohibit use of smoke projectiles containing phosphorous. Specifically, such projectiles are not "incendiary weapons," within the meaning of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons,[108] because they are not primarily designed to set fire or to burn. The Military Advocate General further determined that during the Gaza Operation, the IDF used such smoke projectiles for military purposes only, for instance to camouflage IDF armor forces from Hamas's anti-tank units by creating smoke screens.

120. The Military Advocate General found no grounds to take disciplinary or other measures for the IDF's use of weapons containing phosphorous, which involved no violation of the Law of Armed Conflict. Nevertheless, the Military Advocate General's opinion did not address a number of specific complaints that were received after the investigation concluded and which are being investigated separately.

(vi) Concluding observations

121. The Military Advocate General ended his opinion on the five special command investigations by underlining the IDF's commitment to compliance with the Law of Armed Conflict, as well as its intention to investigate thoroughly every alleged violation by IDF forces. He noted that the evidence gathered by the special investigations reflected great effort by the IDF to ensure such compliance and to minimize harm to civilians.

122. The Military Advocate General acknowledged that the investigations had found operational lapses and errors in the exercise of discretion. However, given the complexities of decision making under pressure, particularly when the adversary has entrenched itself within the civilian population, such mistakes do not in themselves establish a violation of the Law of Armed Conflict.

123. The Military Advocate General further emphasised the importance of implementing the operational lessons learned from the special command investigations.

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[108] Protocol III of the Convention on Prohibitions or Restrictions on the Use of Certain Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW). Israel is not a party to CCW Protocol III.

(2) Additional Special Command Investigation

124. In addition to the original five special command investigations, the Military Advocate General recommended that the Chief of General Staff establish an additional special command investigation to assess certain allegations discussed in the Human Rights Council Fact-Finding Report. The Chief of General Staff agreed and, on 10 November 2009, appointed another Colonel with substantial field and command experience who was not directly involved with the incidents in question to conduct that investigation.

125. The additional special command investigation focuses on three sets of allegations from the Human Rights Council Fact-Finding Report. One set relates to the Al-Samouni residence, where an IDF attack allegedly caused the injury and death of several dozen civilians who were seeking shelter there.[109] Another set of allegations under review relates to claims that the IDF mistreated Palestinians detainees.[110] A third set of allegations under review relates to an alleged attack on the Al-Maquadme Mosque.[111]

126. The alleged attack of the Al-Maquadme Mosque was first examined during one of the original five special command investigations. At that time, the special command investigator concluded that the mosque had not been struck during a military operation. After reviewing the findings of the investigation, along with media accounts and reports of non-governmental organisations (some of which were published after the investigation had concluded), the Military Advocate General recommended that a new special command investigation examine the allegations again.

127. Upon conclusion of his investigation, the special command investigator will present his findings to the Military Advocate General, who will then determine whether there is suspicion of a violation of the Law of Armed Conflict warranting further investigation.

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[109] *See* Human Rights Council Fact-Finding Report ¶¶ 712-22. The mandate required an investigation of allegations that "IDF deliberately shot civilians in the Al-Samouni residential compound in Zeitoun, and prevented the access of medical teams, as well as evacuation of the wounded," resulting in the death of more than 20 civilians. The Military Advocate General had previously referred additional allegations related to the alleged shooting of members of the Al-Samouni family for a criminal investigation. *See* Human Rights Council Fact-Finding Report ¶¶ 709-11.

[110] *See* Human Rights Council Fact-Finding Report ¶¶ 1107-26. The mandate required an investigation of allegations that "IDF forces held the detainees in cruel, inhumane and degrading conditions," such "in pits, exposed to cold and bad weather conditions, handcuffed and with their eyes covered, without food or ability to relieve themselves" and "during the night in trucks, while they are handcuffed, without having enough blankets."

[111] *See* Human Rights Council Fact-Finding Report ¶¶ 822-30. The mandate directed the command investigator to "examine the allegations . . . that during prayer time (between 17:00 and 18:00), an explosion had happened in the entrance to the mosque, resulting in the death of 15 civilians."

(3) Other Command Investigations

128. In addition to the special command investigations discussed above, the Military Advocate General referred complaints regarding approximately 90 incidents for command investigations. These incidents generally involve allegations of civilian injuries or deaths and destruction of civilian property during the Gaza Operation.

129. As explained above, injuries to civilians and damage to civilian property during hostilities do not, in themselves, provide grounds for opening a criminal investigation into potential violations of the Law of Armed Conflict. There must be additional circumstances to warrant a reasonable suspicion of such a violation. As also explained above, after reviewing the findings and record of a command investigation, along with the complaint and other relevant information, the Military Advocate General will decide whether to order a criminal investigation into each incident.

130. To date, the IDF has completed 45 of the approximately 90 command investigations referred by the Military Advocate General. As discussed below, after reviewing the findings and records of command investigations along with other relevant materials, the Military Advocate General has referred 7 incidents for criminal investigations. The Military Advocate General has found that other incidents investigated raised no reasonable suspicion of a violation of the Law of Armed Conflict. Investigations into the remaining 45 incidents continue.

B. Criminal Investigations

131. To date, the Military Advocate General has already referred 36 separate incidents for criminal investigation. The Military Advocate General determined that the nature of the alleged incidents and/or the evidentiary record raised a reasonable suspicion that allegedly criminal behaviour occurred.

132. Special investigative teams of the MPCID were appointed solely for the purpose of investigating complaints stemming from the Gaza Operation. The Commander of the MPCID supervises the professional investigative teams, with involvement by the Office of the Military Advocate for Operational Matters. The teams included 16 investigators, as well as Arabic interpreters.

133. The MPCID has sought assistance from non-governmental organisations (such as B'Tselem) to help locate Palestinian complainants and witnesses and to coordinate their arrival at the Erez crossing point to Gaza, to allow interviews and questioning. To date, MPCID

investigators have taken testimony from almost 100 Palestinian complainants and witnesses, along with approximately 500 IDF soldiers and commanders. They have devoted thousands of working hours to the investigations thus far.

134. Of the 36 incidents referred thus far for criminal investigation, 19 incidents involved alleged shootings towards civilians. The Military Advocate General referred most of these incidents (12) directly for criminal investigation (without requesting a command investigation or awaiting the results of one), while some of them (7) were referred after the Military Advocate General reviewed the findings and records gathered during command investigations and concluded that there was a reasonable suspicion of criminal activity by IDF forces.

135. The remaining 17 incidents involved allegations of using civilians as human shields, mistreatment of detainees and civilians, and pillage and theft. In these instances, the Military Advocate General determined that the allegations, if true, concerned events that were clearly beyond any legitimate operational activity, and therefore directly referred all of the cases to criminal investigation.

136. The allegations referred for criminal investigation came from a variety of sources, including: local and international media reports and inquiries; letters from Palestinians or their attorneys; and letters and reports from non-governmental organisations (e.g., Public Committee against Torture in Israel, Human Rights Watch, Amnesty International, Médecins Sans Frontières). Some of these incidents are also described in the Human Rights Council Fact-Finding Report. The Military Advocate General opened a number of direct criminal investigations after hearing reports alleging that IDF soldiers had described conduct by themselves or fellow soldiers that would violate the Law of Armed Conflict.

137. Of these 36 criminal investigations, 1 investigation has already led to an indictment and conviction of an IDF soldier.[112] The Military Advocate General has exercised his discretion to close 7 criminal investigations without charges because the complainants

[112] During a search of a Palestinian residence, the soldier stole a credit card belonging to one of the occupants and subsequently used the card to withdraw the equivalent of more than $400. Following his confession, the soldier served seven and a half months in prison. The Court Martial declared: "The crime of looting is harmful to the moral duty of every IDF soldier to keep human dignity, a dignity 'that does not depend on origin, religion, nationality, sex, status and function.' Besides, with the commission of the crime of looting, the accused harmed the 'combat moral code,' the spirit of the IDF, in using his power and his arms not for the execution of his military mission." *Military Prosecutor v. Sergeant A.K.*, S/153/09 ¶ 12 (11 August 2009).

refused to give testimony and/or there was insufficient evidence of a criminal violation.[113] The remaining 28 investigations are ongoing.

C. Incidents Discussed in Human Rights Council Fact-Finding Report

138. The incidents subject to command and criminal investigations discussed above include the 34 incidents addressed at length in the Human Rights Council Fact-Finding Report.[114]

139. As of 15 September 2009, when the Human Rights Council Fact-Finding Report was released, Israel was already investigating 22 of these 34 incidents. The Report brought the remaining 12 incidents to the IDF's attention for the first time – 10 of which involved alleged damage to property and 2 of which involved alleged harm to civilians. The Military Advocate General promptly referred these 12 additional incidents for investigation.[115]

140. The current status of the investigations of incidents discussed in the Human Rights Council Fact-Finding Report is as follows:

- 11 incidents are the subject of on-going criminal investigations by the MPCID (Part IV.B above). Two of these investigations were concluded, with no suspicion for criminal behaviour.

- 7 incidents were investigated as part of the special command investigations (Part IV.A.1 and Part IV.A.2 above). The Military Advocate General has requested further review of 2 of these incidents.

- The remaining incidents were subject to regular command investigations (Part IV.A.3 above). Some of these investigations are still ongoing.

[113] As noted above, the Military Advocate General's decision to close these investigations is subject to review by the Attorney General and the Supreme Court.

[114] The exact number of incidents addressed in the Human Rights Council Fact-Finding Report is unclear. The Report itself indicates that the Fact-Finding Mission investigated 36 incidents in Gaza. *See* Human Rights Council Fact-Finding Report ¶ 16. However, the State of Israel has been able to identify 34 separate incidents in Gaza that are discussed in the Report.

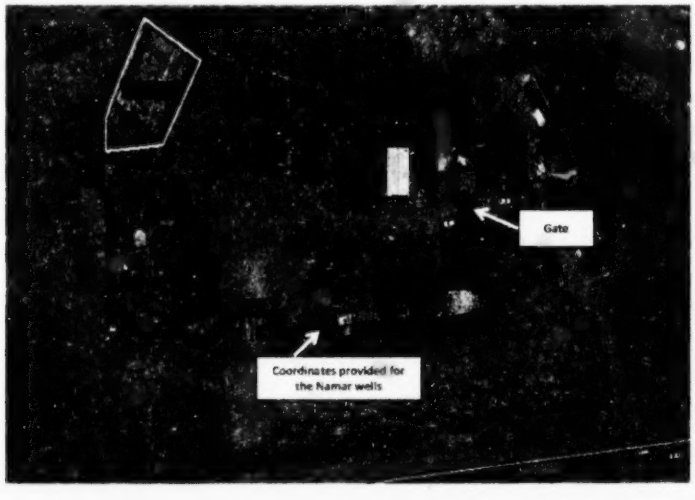
[115] As noted earlier, the Military Advocate General recommended a sixth special command investigation to consider certain incidents discussed in the Human Rights Council Fact-Finding Report. In addition, the Military Advocate General referred one incident discussed in the Report – alleging the use of a Palestinian as a human shield – directly for criminal investigation.

141. Regarding certain incidents discussed in the Human Rights Council Fact-Finding Report, the Military Advocate General has reviewed the entire record and concluded that there was no basis for a criminal investigation. Some examples are detailed below.

(1) Namar wells group, Salah ad-Din Street, Jabaliyah refugee camp[116]

142. When the IDF first learned about the allegations relating to the Namar wells from the Human Rights Council Fact-Finding Report, it tried to locate the wells (since the Report does not provide any coordinates). For this purpose, the Israeli Coordination and Liaison Administration (CLA) asked the Gaza Coastal Municipalities Water Utility (CMWU) to provide the exact coordinates of the facility.

143. According to the findings of the command investigation, the CMWU provided coordinates located within a closed military compound of Hamas. This compound served as a regional command and control center and was used for military training and weapons storage. Guards manned the entry to the compound and prohibited entry by unauthorized civilians. The coordinates provided for the wells and the manned entry point to the compound are illustrated in the following photograph, taken prior to the alleged incident.



▶ Hamas military compound, with coordinates provided for the Namar wells circled in red (Source: IDF)

[116] *See* Human Rights Council Fact-Finding Report ¶¶ 975-83.

144. The IDF attacked the compound on 27 December 2008, at 11:30. All strikes were accurate. The command investigation further determined that pre-planned attacks, such as this one, took into account the existence of sensitive sites, including water facilities, inside or near the intended target, in the decisions whether to attack the target and what precautions to use. When planning the attack on this specific military target, the IDF knew of no water facility inside the compound. The IDF did identify a water well 195 metres from the compound and took precautionary measures, which ensured that the well was not hit or damaged.

145. The command investigation revealed that although the Israeli CLA requests and receives updates from different sources on sensitive sites inside Gaza, it had no information about the Namar water wells before the operation. After the Gaza Operation, the CMWU provided the CLA information about the location of 143 water wells. According to IDF procedures and practices, had the CLA received such information before the operation, it would have been immediately reported to all relevant IDF units.

146. The Military Advocate General reviewed the findings of the command investigation, together with the additional information contained in the Human Rights Council Fact-Finding Report.

147. The Military Advocate General concluded that the Hamas military compound, where the Namar wells were located, was a legitimate military target. The Military Advocate General found that the IDF did not know of the existence of the water wells within the Hamas military compound and did not direct the strike against the water facilities.

148. The Military Advocate General took note of the fact that standing orders issued throughout the Gaza Operation strictly forbade any acts damaging water installations. Moreover, the Military Advocate General found no credible basis for the allegation that the strike was intended to deprive the civilian population of Gaza of water. To the contrary, the IDF made significant efforts to ensure that the population of Gaza had a sufficient and continuous water supply.[117]

149. Accordingly, the Military Advocate General found no basis to order a criminal investigation regarding the case.

[117] During the actual fighting, in several instances, the IDF coordinated the movement of the Palestinian Water Authority (CMWU) maintenance teams to repair water infrastructure (beyond the repairs permitted during humanitarian windows). Additionally, five trucks of infrastructure supplies, including pumps, generators, spare parts, and purification kits, were brought into Gaza at the request of the CMWU.

(2) The Gaza wastewater treatment plant, Road No. 10, al-Sheikh Ejlin, Gaza City[118]

150. The IDF first learned of allegations of deliberate attacks of the Gaza wastewater treatment plant in Sheikh Ejlin from the Human Rights Council Fact-Finding.

151. The command investigation of this incident included the gathering of information from relevant commanders and officers and from ground and aerial forces. In addition, investigators received information from the Israeli CLA, which was in direct contact with Mr. Munther Shublaq, the Director of the CMWU.

152. Initial findings from the investigation were presented to the Military Advocate General, who asked for several clarifications before reaching his conclusions. The main findings of the command investigation are as follows.

(i) The date of the incident

153. Based on an analysis of aerial photographs of the wastewater treatment plant from the relevant days, it was determined that the damage to the facility occurred on 10 January 2009. In an aerial photograph taken that day, the damage to the wall of one of the basins, as well as the flow of sewage to nearby fields, can be seen for the first time.

▶ Aerial photograph of wastewater treatment plant in Sheikh Ejlin, 9 January 2009, with no damage visible (Source: IDF)

[118] *See* Human Rights Council Fact-Finding Report ¶¶ 962-72.

▶ Aerial photograph of wastewater treatment plant in Sheikh Ejlin, 10 January 2009, with breach of upper basin marked in red (Source: IDF)

154. The ICRC presented a preliminary report about the basin breach to the Israeli CLA on 12 January 2009. During the following days, the CLA tried to coordinate the arrival of Gaza's CMWU teams to address the situation, but these efforts did not succeed due to the fighting in the area.

155. The Director of Gaza's CMWU reported to the CLA that 50,000 cubic meters of sewage leaked from the treatment plant; and that the direction of the leak was towards the southwest, an agricultural area.

(ii) The possibility of an aerial strike

156. The wastewater treatment plant was not defined, prior to or during the operation, as a target for an aerial strike. The nearest aerial strike on the relevant dates was 1.3 kilometres away from the plant.

(iii) The possibility of a ground attack

157. Given the characteristics of the damage caused to the basin, it is unlikely that it resulted from flat-trajectory fire of the IDF. The IDF executed no high-trajectory fire towards the plant, and the operations logs identify no such target point.

158. When the armoured forces passed near the plant, during the operation, the basin wall was already breached and the area surrounding it was flooded, thus limiting the movement of the forces in that area.

(iv) The possible causes of damage to the basin

159. The Military Advocate General reviewed the findings of the command investigation, in light of the details provided in the Human Rights Council Fact-Finding Report and the CMWU report of January 2009, entitled "Damage Assessment Report: Water and Waste Water Infrastructure and Facilities."

160. Taking into account all available information, the Military Advocate General could not definitively rule out the possibility that IDF activity had caused the damage to the wall of the third basin of the wastewater treatment plant (which probably occurred on 10 January). At the same time, he could also not dismiss the possibility that the damage to the basin might have resulted from a deliberate action by Hamas as part of a defensive plan to hamper the movement of IDF forces in the area.

161. The Military Advocate General was able to determine that this damage did not result from an intentional and pre-planned IDF attack. In this regard, the Military Advocate General endorsed the conclusions of the command investigation that the wastewater treatment plant was not a pre-planned target and that the breaching of the basin wall and the flooding of the area with sewage significantly limited the maneuverability of IDF ground forces, especially armoured vehicles, in that area. Moreover, the Military Advocate General noted that there was no physical evidence or eyewitness testimony to support the conclusion of the Human Rights Council Fact-Finding Report.

162. Accordingly, the Military Advocate General found no reason to order a criminal investigation regarding the case.

(3) El-Bader flour mill[119]

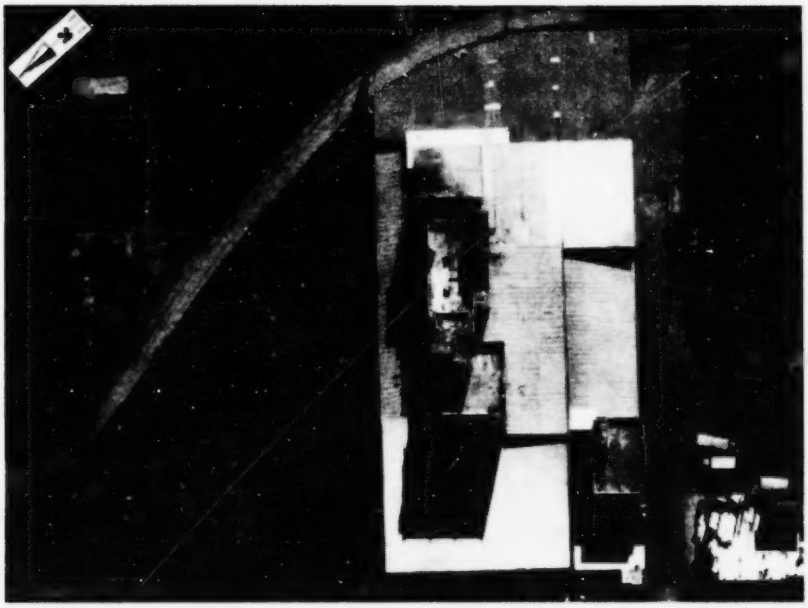
163. With respect to the allegation of deliberate targeting of the el-Bader flour mill, the IDF conducted a command investigation, which gathered evidence from numerous sources, including relevant commanders and officers and ground and aerial forces. In addition, the investigator received information from the Israeli CLA, which was in direct contact with the owner of el-Bader flour mill, Mr. Rashad Hamada. The command investigation included several findings, which are delineated below.

164. From the outset of the Gaza Operation, the immediate area in which the flour mill was located was used by enemy armed forces as a defensive zone, due to its proximity to Hamas's stronghold in the Shati refugee camp. Hamas had fortified this area with tunnels and booby-trapped houses, and deployed its forces to attack IDF troops operating there. For example, 200 meters south of the flour mill an IDF squad was ambushed by five Hamas operatives in a booby-trapped house; 500 meters east of the flour mill another squad engaged enemy forces in a house that was also used for weapons storage; and adjacent to the flour mill, two booby-trapped houses exploded.

165. The IDF ground operation in this area began on 9 January 2009, during night time. Before the ground operation, the IDF issued early warnings to the residents of the area, included recorded telephone calls, urging them to evacuate. Such telephone calls were made to the flour mill as well.

166. While preparing for the operation, the commanders identified the flour mill as a "strategic high point" in the area, due to its height and clear line of sight. Nevertheless, in the planning stage, it was decided not to pre-emptively attack the flour mill, in order to prevent damage to civilian infrastructure as much as possible.

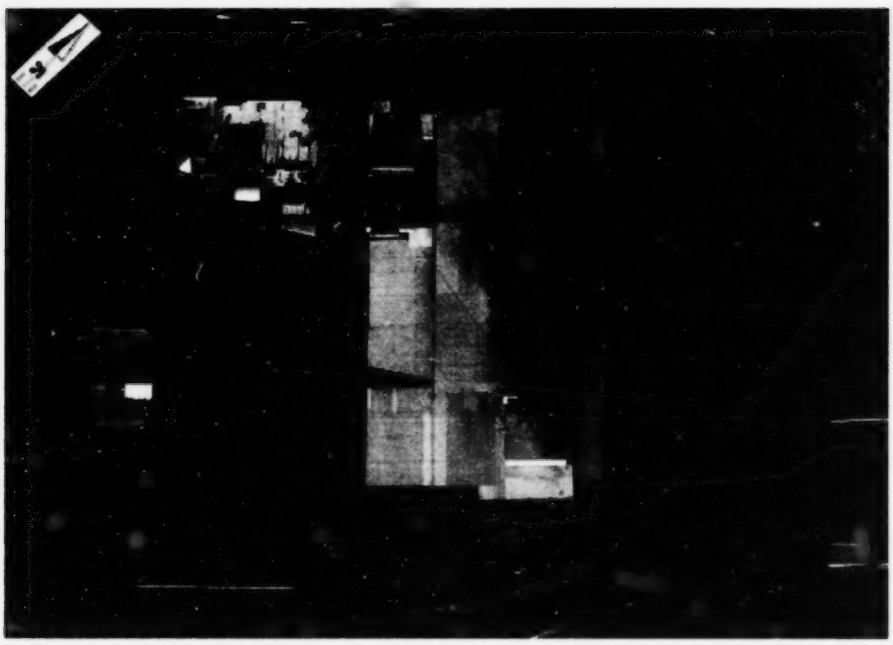
[119] *See* Human Rights Council Fact-Finding Report ¶¶ 913-21.



► El-Bader flour mill, 9 January 2009, prior to alleged incident (Source: IDF)

167. In the course of the operation, IDF troops came under intense fire from different Hamas positions in the vicinity of the flour mill. The IDF forces fired back towards the sources of fire and threatening locations. As the IDF returned fire, the upper floor of the flour mill was hit by tank shells. A phone call warning was not made to the flour mill immediately before the strike, as the mill was not a pre-planned target.

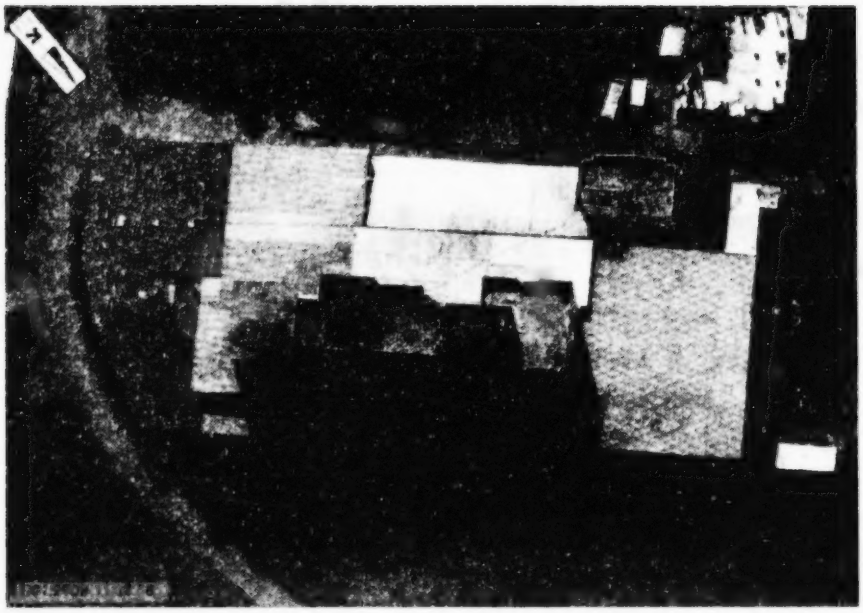
168. Several hours after the incident, and following a report about fire in the flour mill, the IDF coordinated the arrival of several fire engines to fight the fire.



► El-Bader flour mill, 10 January 2009, following alleged incident. Fire trucks are visible on the scene. (Source: IDF)

169. The Military Advocate General reviewed the findings and the records of the command investigation and other materials. In addition, the Military Advocate General reviewed the information included in the Human Rights Council Fact-Finding Report, as well as the transcript of the public testimony of Mr. Hamada to the Fact-Finding Mission.

170. Taking into account all available information, the Military Advocate General determined that the flour mill was struck by tank shells during combat. The Military Advocate General did not find any evidence to support the assertion that the mill was attacked from the air using precise munitions, as alleged in the Human Rights Council Fact-Finding Report. The Military Advocate General determined that the allegation was not supported in the Report itself, nor in the testimony to the Fact-Finding Mission by Rashad Hamada, who had left the area prior to the incident in response to the IDF's early warnings. Photographs of the mill following the incident do not show structural damage consistent with an air attack.



► El-Bader flour mill, 11 January 2009, following alleged incident (Source: IDF)

171. The Military Advocate General found that, in the specific circumstances of combat, and given its location, the flour mill was a legitimate military target in accordance with the Law of Armed Conflict. The purpose of the attack was to neutralize immediate threats to IDF forces.

172. The Military Advocate General did not accept the allegation in the Human Rights Council Fact-Finding Report that the purpose of the strike was to deprive the civilian population of Gaza of food. In this regard, he noted the fact that shortly after the incident, the IDF allowed Palestinian fire trucks to reach the area and extinguish the flames, as well as the extensive amount of food and flour that entered Gaza through Israel during the Gaza Operation.[120]

173. Although the Military Advocate General could not conclusively determine that the flour mill was in fact used by Hamas's military operatives, there was some evidence of such use. The Military Advocate General noted that Mr. Hamada testified before the Fact-Finding Mission that after the operation he found empty bullets on the roof of the flour mill. This could not have been the result of IDF fire, since – as was evident from the findings of the command investigation – the IDF forces which occupied the mill's compound three days

[120] *See The Operation in Gaza: Factual and Legal Aspects* ¶¶ 266-82.

after the incident did not occupy the roof of the mill, where they would have been exposed to enemy fire.

174. Accordingly, the Military Advocate General found no reason to order a criminal investigation regarding the case.

(4) The house of Abu-Askar family[121]

175. The IDF conducted a command investigation into allegations concerning a deliberate strike of the residence of Muhammad Abu-Askar. The command investigation gathered evidence from numerous sources, including relevant commanders and officers, ground and aerial forces, and aerial photos.

176. According to the findings of the command investigation, the cellar and other parts of Mr. Abu-Askar's house were used to store weapons and ammunitions, including Grad rockets. Furthermore, the area where the house was located was frequently used as a launch area for rockets aimed at Israeli towns.

177. Before the strike, the IDF made a telephone call to Mr. Abu-Askar's house warning of the strike. The call was received by Muhammad Abu-Askar. Following this warning, all occupants immediately evacuated the premises. Moreover, the attack took place at night, when fewer civilians were likely to be in the area. There were no civilian casualties from the strike.

178. Shortly after the strike, two sons of Mr. Abu-Askar, both Hamas military operatives, were killed while they were involved in launching mortars at IDF forces.[122]

179. The Military Advocate General reviewed the findings and the entire record of the command investigation, together with other information on the incident included in the Human Rights Council Fact-Finding Report. He also reviewed the public testimony given by Mr. Abu-Askar before the Fact-Finding Mission.

180. The Military Advocate General concluded that due to its use as a large storage facility for weapons and ammunition, including Grad missiles, the house of Muhammad Abu-Askar

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[121] *See* Human Rights Council Fact-Finding Report ¶¶ 975-85.

[122] The circumstances of this incident were detailed in *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 336-40.

was a legitimate military target. The strike was not directed against the residents of the house, but rather against the weapons stored in it.[123]

181. The Military Advocate General further determined that the attack adhered to the IDF's obligation to take precautions to minimise incidental loss of civilian life. The effectiveness of certain precautions – the timing of the attack and the use of warnings – was evident in the fact that there were no civilian casualties in the incident. The intended military advantage of eliminating a large stockpile of weapons, including long-range rockets, exceeded the anticipated harm to civilians.

182. Accordingly, the Military Advocate General found no reason to order a criminal investigation regarding the case.

V. CONCLUSION

183. The Gaza Operation presented complex challenges to Israel and the IDF. While the need and obligation to respond effectively to the thousands of Hamas rockets and mortars that had terrorized Israeli civilians for years was clear and acute, the strategies adopted by Hamas, and in particular its systematic entrenchment in the heart of civilian areas, created profound operational dilemmas.

184. These challenges did not end with the close of operations. A key element of respecting the Law of Armed Conflict is a commitment genuinely to review military operations after the fact, and thoroughly investigate allegations of unlawful activity. Fulfilling this commitment in the context of Gaza is demanding, and requires serious efforts to obtain evidence from battleground situations and to make arrangements to enable residents of Gaza to give their accounts. It also requires an awareness that, in complex combat situations, errors of judgment, even with tragic results, do not necessarily mean that violations of the Law of Armed Conflict have occurred.

185. A further challenge is presented by the scale of the investigations. Because Israel followed up on every allegation, regardless of whether the source was neutral, hostile, or friendly, it launched investigations into 150 separate incidents, including 36 criminal investigations opened thus far. More broadly, the six special command investigations initiated by the IDF addressed more general concerns that arose in the course of the fighting. Beyond the

[123] The sole basis for the claim in the Human Rights Council Fact-Finding Report that the house was a civilian target was Mr. Abu-Askar's testimony before the Fact-Finding Mission. The Mission, however, did not ask Mr. Abu-Askar any questions about the potential use of his house for military purposes.

disciplinary and criminal proceedings that have been initiated, operational lessons from these investigations have been incorporated in IDF practice.

186. In this Paper, Israel has sought to share its investigative procedures, and has described the various mechanisms involved, including those operating independently within the military system as well as the civilian oversight provided by the Attorney General and the Supreme Court.

187. Israel recognizes the importance of engaging in dialogue and sharing best practices on the conduct of investigative proceedings with other democratic states facing similar challenges and committed to upholding the rule of law.

Annex II

Letter dated 29 January 2010 from the Permanent Observer of Palestine to the United Nations addressed to the Secretary-General

[Original: English]

Pursuant to the note of 3 December 2009, in which the United Nations Secretariat, on your behalf, requested the Permanent Observer Mission of Palestine to the United Nations to provide written information with regard to the steps that the Palestinian side may have taken in connection with paragraph 4 of General Assembly resolution 64/10 of 5 November 2009, entitled "Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict", I have the honour to convey to you a letter, dated 27 January 2010, from Prime Minister Salam Fayyad transmitting the following documents submitted by the Palestinian leadership:

- A Presidential Decree establishing an Independent Investigative Commission in Follow-up of the Goldstone Report
- A preliminary report by the Independent Investigative Commission in Follow-up of the Goldstone Report

As Prime Minister Fayyad has indicated in his letter, we will continue to provide you with updates and further reports regarding future developments and progress of the work of the Investigative Commission in Follow-up of the Goldstone Report. In this regard, I wish to assure you that the Commission, as evident in its mandate, its composition and its programme of work, will strive to carry out in the most efficient and timely manner an independent and credible investigation that is in conformity with international standards into the allegations of violations of international humanitarian and human rights law contained in the report of the United Nations Fact-Finding Mission on the Gaza Conflict, as urged by the General Assembly in paragraph 4 of resolution 64/10.

In this regard, I wish to reiterate Palestine's firm position that there is absolutely no symmetry or proportionality between the occupying Power and the occupied people and thus our rejection of any equating of the military aggression and crimes committed by Israel, the occupying Power, against the Palestinian people with actions that may have been committed by the Palestinian side.

Nevertheless, Palestine does take seriously the allegations contained in the Goldstone report regarding possible Palestinian violations, and we have thus, in accordance with General Assembly resolution 64/10, launched this Independent Investigative Commission. We do so on the basis of our utmost respect for and conviction in the rule of law and United Nations resolutions. Moreover, we are upholding our responsibilities in this regard based upon our strong belief that the genuine pursuit of accountability by all members of the international community will ultimately bring an end to the impunity that Israel, the occupying Power, has for too long acted with and benefited from. Such accountability will in the long term unquestionably serve the cause of peace, which cannot be attained without justice.

(*Signed*) Riyad **Mansour**
Ambassador
Permanent Observer of Palestine to the United Nations

Enclosure

[Original: Arabic]

27 January 2010

I have the honour to deposit with you a copy of the Presidential Decree issued by President Mahmoud Abbas on 25 January 2010 concerning the formation of an independent commission to follow up the Goldstone report. That commission will undertake its mandated duties and responsibilities, including investigation and production of a preliminary report on its work.

The attachments to the present letter constitute a response to the demands made on us in General Assembly resolution 64/10, paragraph 4, dated 5 November 2009. That paragraph states as follows:

> [*The General Assembly*]
>
> *Urges*, in line with the recommendation of the Fact-Finding Mission, the undertaking by the Palestinian side, within a period of three months, of investigations that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice.

The attached documents also constitute a response to the letter dated 3 December 2009 from the United Nations Secretariat which requested the Permanent Observer Mission of Palestine, by 29 January 2010, to provide the Secretary-General with written information on the steps taken or currently being taken by the Palestinian side in response to the request of the General Assembly in its resolution 64/10, paragraph 4.

(*Signed*) Salam **Fayyad**
Prime Minister
Palestinian National Authority

Attachment I

[Original: Arabic]

Decree No. ( ) 2010

Concerning the formation of an independent commission to follow up the Goldstone report

The President of the State of Palestine,

President of the Palestine Liberation Organization Executive Committee,

President of the Palestinian National Authority,

On the basis of the provisions of the Amended Basic Law of 2003 and its amendments,

Having considered the Decision of the Prime Minister dated 14 January 2010,

Having considered also the Goldstone report,

By virtue of the powers with which he is invested, and in the interests of the public, has decided as follows:

Article 1

To form an independent commission to follow up implementation of the recommendations made in the Goldstone report with respect to the Palestinian National Authority, composed of the following:

1. Issa Abu Sharar, Chairman
2. Zuhair al-Surani, member
3. Ghassan Farmand, member
4. Yasser al-Amuri, member
5. Nasser Rayyes, member

Article 2

1. To authorize that Commission to undertake the investigative duties and responsibilities required of it pursuant to the Goldstone report, and to work in accordance with the timetable provided for in that report.

2. The Commission shall submit its recommendations and the outcome of its work to the relevant authorities.

Article 3

The Commission shall appoint the experts and specialists it considers most appropriate to assist it in performing its duties.

Article 4

All relevant official and unofficial parties shall cooperate with the Commission and provide it with all the facilities and information necessary for it to perform its duties.

Article 5

All the relevant parties shall implement the provisions of this Decree with effect from its publication. The Decree shall be published in the Official Gazette.

Ramallah, 25 January 2010

(*Signed*) Mahmoud **Abbas**
President of the State of Palestine
President of the Palestine Liberation Organization Executive Committee
President of the Palestinian National Authority

Attachment II

[Original: Arabic]

I have the honour to transmit to you herewith the preliminary report on the work of the Independent Commission to follow up implementation of the recommendations made in the Goldstone report, for transmission to the Permanent Observer of Palestine to the United Nations by the date specified, namely, 29 January 2010.

(*Signed*) Issa **Abu Sharar**
Chairman
Independent Commission to follow up implementation
of the recommendations made in the Goldstone report

Ramallah, 28 January 2010

Report of meeting of the Independent Investigation Commission that was established pursuant to General Assembly resolution 64/10

On 25 January 2010, Presidential Decree No. 0105 of 2010 was issued by the President of the State of Palestine, President of the Palestine Liberation Organization Executive Committee and President of the Palestinian National Authority, H.E. President Mahmoud Abbas. The Decree concerned the formation of an independent investigative commission, in accordance with the recommendation of the Fact-Finding Mission and pursuant to General Assembly resolution 64/10, paragraph 4, dated 5 November 2009. That paragraph states as follows:

> [*The General Assembly*]
>
> *Urges*, in line with the recommendation of the Fact-Finding Mission, the undertaking by the Palestinian side, within a period of three months, of investigations that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice.

The Commission was constituted as follows:

1. Judge Issa Abu Sharar, Chairman: 1963-1970 Public Prosecutor and subsequently Assistant Prosecutor General of Jordan; 1971-1996 lawyer, Jordan; 1998 President of the Court of Appeal; 2002 Judge of the Palestinian High Court; 2005 President of the High Court and President of the Palestinian High Judicial Council. Retired on 29 November 2009.

2. Judge Zuhair al-Surani, member: 1958-1964 representative of the Public Prosecutor's Office, Gaza; 1964 Judge, Court of First Instance; 1967 Judge, Supreme Court; 1999 Public Prosecutor; 2002 Palestinian Minister of Justice; 2003 President of the High Court and President of the Palestinian High Judicial Council. Retired in 2005.

3. Ghassan Farmand, member. Awarded doctorate of law in France in 1981. 1982 Professor of Law at Birzeit University; 1993 established and directed Institute of Law at Birzeit University. President of Palestinian Red Crescent Society, Ramallah, and member of numerous non-governmental legal institutions. Participated in numerous international conferences, including Yale conferences.

4. Yasser al-Amuri, member. Awarded doctorate of public international law in Spain in 2003. 2003 Professor of Public International Law at Al-Quds University; 2005 Professor of Public International Law at Birzeit University; 2006-2009 Head of Institute of Law and Dean of Masters of Law Programme at Birzeit University. Member of many non-governmental legal institutions. Participated in numerous international conferences and contributed to various studies on human rights.

5. Professor Nasser Rayyes, member. Practitioner of law since 1997. 1998 researcher and legal consultant to Al-Haq, a branch of the International Commission of Jurists; 2002 President of the Committee on Human Rights of the Palestine Academy for Science and Technology; 2003 established Palestinian National Committee for International Humanitarian Law. Member of and contributor to many non-governmental legal institutions. Participated in numerous international

conferences and contributed to various studies on human rights. Head of International Humanitarian Law Team responsible for producing a training guide to the provisions of international law; specialized trainer in human rights law and documentation of crimes and violations.

The Commission held its first meeting in Ramallah on 28 January 2010, with a view to undertaking its mandated duties and responsibilities, pursuant to the above-mentioned Presidential Decree. In accordance with General Assembly resolution 64/10, paragraph 4, dated 5 November 2009, the Commission adopted a working methodology based on the principles and standards laid down in public international law, the Charter of the United Nations, international humanitarian law, international human rights law, international criminal law and the relevant United Nations human rights decisions and declarations, in addition to the precepts of the Palestinian Basic Law and the provisions of national legislation. The Commission considered the Goldstone report and the demands it had made of the Palestinian National Authority, and decided to devise a plan of action and a series of measures for implementation of the mandated duties, including the procedural rules and principles that would ensure that the Commission undertook its investigation in accordance with the principles of justice, equity and impartiality. It would also establish the conditions for the selection of experts, give specifications for investigators and devise witness and informer protection mechanisms. The Commission decided to enlist the help of experts, specialists and appropriate civil society organizations in carrying out its duties, and in due course will inform the relevant parties of all pertinent developments and reports.

Annex III

Letter dated 29 January 2010 from the Chargé d'affaires a.i. of the Permanent Mission of Switzerland to the United Nations addressed to the Secretary-General

[Original: French]

I have the honour to transmit to you the attached summary of the steps that Switzerland has taken to date to implement paragraph 5 of General Assembly resolution 64/10 on the follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict.

(*Signed*) Heidi **Grau**
Chargé d'affaires a.i.

Enclosure

Progress of consultations regarding action pursuant to paragraph 5 of General Assembly resolution 64/10

On 5 November 2009, the United Nations General Assembly adopted resolution 64/10, entitled "Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict", in paragraph 5 of which the General Assembly "Recommends that the Government of Switzerland, in its capacity as depositary of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, undertake as soon as possible the steps necessary to reconvene a Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to ensure its respect in accordance with common article 1".

In accordance with this recommendation, Switzerland, in its capacity as depositary of the Geneva Conventions, and through its Permanent Mission to the United Nations in Geneva, undertook preliminary consultations between 9 and 17 December 2009. Because of time pressure, the preliminary consultations could be held only with a limited number of parties.

Switzerland consulted Israel and Palestine, as parties directly involved; Egypt, Saudi Arabia, Syria, Pakistan (as coordinator on human rights and humanitarian issues in Geneva of the Organization of the Islamic Conference) and Algeria (as the Chair of the Council of Arab Ambassadors in Geneva), as interested parties from the region; China, the United States of America, France, the United Kingdom and Russia, as permanent members of the United Nations Security Council; and Sweden and Spain, as outgoing and incoming holders of the Presidency of the European Union.

The League of Arab States, the International Committee of the Red Cross, the Office of the High Commissioner for Human Rights, the human rights coordinators of the five regional groups in Geneva, the United Nations Relief and Works Agency for Palestine Refugees in the Near East and the Department of Political Affairs of the United Nations Secretariat were informed of these steps.

In addition, Switzerland was notified of the positions of Australia and Canada on the matter, and was approached by a number of delegations from various regional groups, which expressed their desire to be informed of the process under way.

The preliminary consultations were oral and informal. The responses followed the same pattern, with the exception of the two written contributions. Switzerland began each meeting by emphasizing its view that a Conference of High Contracting Parties must be inclusive and be conducive to a concrete result, rather than being used as a platform to air recriminations connected with any party to the conflict. Switzerland accordingly requested the parties it approached to give their views on the content, timing and level of representation at a Conference, and to make concrete suggestions. The reactions can be divided into three categories:

(1) The first group favoured the holding of a conference, preferably at high level, aimed at identifying individual and collective steps to ensure respect for and implementation of the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including East Jerusalem. The

States in question took the view that a Conference of High Contracting Parties should be held in April 2010, in order to avoid a clash with other major conferences or events in Geneva, while still acknowledging the importance of proper and appropriate preparation. They emphasized the need to focus on legal issues. Some States were reflecting on concrete steps, including proposed mechanisms, which they intended to submit for consideration at a later stage.

(2) The second group firmly opposed the holding of a Conference of High Contracting Parties. The States in question were concerned that such a conference could be a needless distraction from, or a damaging obstacle to, the resumption of bilateral negotiations between the Government of Israel and the Palestinian Authority. A politicization of the discussions was regarded as inevitable. Some States also voiced their opposition on grounds of substance. They pointed to the lack of specific provision for such a conference in the Geneva Conventions. They also underlined that paragraph 5 of General Assembly resolution 64/10 took the form of a recommendation.

(3) The third group, while not formally opposing the convening of a Conference of High Contracting Parties, was unenthusiastic at that prospect. Those States regarded such an event as neither useful nor urgent. They were sceptical about the added value of a reconvened conference, indicating that the experience of the Conference of High Contracting Parties of 5 December 2001 had shown no discernible tangible impact on the ground. They could not support a conference that would be used to criticize one particular country.

In conclusion, these consultations, which were limited in number, did not reveal a dominant trend for or against the holding of a Conference of High Contracting Parties, or a view on the contribution to the civilian population affected of a reconvened Conference of High Contracting Parties to the Fourth Geneva Convention; in other words, it was uncertain what results could be expected for what issues.

Switzerland has been encouraged to hold its own discussions on the matter and to share their outcome at the appropriate time. Such discussions will focus on the environment and aims of a reconvened Conference of High Contracting Parties. They will be an integral part of a second round of consultations, open to all the High Contracting Parties and other interested parties, that Switzerland intends to conduct in the near future. In that task, Switzerland will be guided by the desire to protect civilians and to ensure that their humanitarian needs are met.